CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 518

PACIFIC COAST STEEL COMPANY, PETITIONER,

vs.

JOHN P. McLAUGHLIN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1932

CERTIORARI GRANTED JANUARY 9, 1933

(37,215)

(37,215)

SUPREME COURT OF THE UNITED STATES

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorneys for Plaintiff and Appellant.

GEORGE J. HATFIELD, United States Attorney, ESTHER B. PHILLIPS, Assistant United States Attorney, Post Office Building, San Francisco, California,

Attorneys for Defendant and Appellee.

DOCKET No. 18,425–L.

TITLE OF CASE.

PACIFIC COAST STEEL CO., a Corporation,

vs.

JOHN P. McLAUGHLIN, etc.

ATTORNEYS.

CLAUDE I. PARKER,

RALPH W. SMITH,

TO RECOVER TAXES.

GEO. J. HATFIELD,

U. S. Atty.

FILINGS, PROCEEDINGS, ETC.

May 13, 1929.	1.	Filed Complaint. Issued Summons.
May 14, 1929.	2.	Filed Summons.
May 24, 1929.	3.	Filed order ex. time to plead.
June 5, 1929.	4.	Filed demurrer and points.

July	1, 1929	Ord. dem. dropped from calendar.
Aug.	12, 1929.	Ord. con. Aug. 19.
Aug.	19, 1929.	Ord. dem. con. to Sept. 16.
Sept.	23, 1929.	Ord. dem. overruled with leave to answer in 10 days.
Oct.	7, 1929.	5. Filed notice of setting cause for trial.
Oct.	10, 1929.	6. Filed Answer.
Oct.	14, 1929.	Ord. trial set Jan. 14, 1930.
Jan.	13, 1929.	7. Filed stip. waiving jury. Ord. trial; ord. leave granted plf. to amend compl't; evidence introduced; mo. for judgm't by both parties; ord. case submitted on briefs–10–10–10 days.
Jan.	22, 1930.	8. Filed pl*fts*. opening brief.
Mar.	20, 1930.	9. Filed outline of brief.
Apr.	12, 1930.	10. Filed pl*fts*. final brief.
Apr.	14, 1930.	11. Filed order allowing deft. to file reply brief.
Apr.	22, 1930.	12. Filed reply brief. Ord. case submitted.
July	27, 1931.	Ord. judgment in favor of def't on findings to be filed.
Aug.	3, 1931.	Lodged findings, etc. Lodged Amendments to findings.
Aug.	5, 1931.	13. Filed findings, etc. Ent'd Judgment for defendant for costs (J. R. 15, p. 493) Made Judgment Roll.
		14. Filed bill of exceptions, etc.

Aug. 6, 1931.	15.	Filed memo. of costs.
	16.	Filed no. of entry of Judgment.
Aug. 18, 1931.	17.	Filed Petition for appeal.
	18.	Filed Order allowing appeal.
	19.	Filed Assignments of Error.
Aug. 19, 1931.	20.	Filed Bond on Appeal. Filed Citation on appeal.
	21.	Filed praecipe on appeal.

[1*]

In the District Court of the United States of America, in and for the Northern District of California, Southern Division.

No. 18,425–L.

PACIFIC COAST STEEL COMPANY, a Corporation,

Plaintiff,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First District of California,

Defendant.

COMPLAINT (IN LAW).

(For Recovery of Income and Excess Profits Taxes Illegally Assessed and Collected.)

The plaintiff herein, for cause of action against the defendant, alleges:

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*Page-number appearing at the foot of page of original certified Transcript of Record.

I.

That said plaintiff is now and was during all the times herein mentioned a corporation duly organized, chartered and existing under and by virtue of the laws of the State of California, and during all of the times hereinafter mentioned was a resident and citizen of the State of California, having its principal place of business in the First District of California, in the City and County of San Francisco, State of California, and has at all times borne true allegiance to the Government of the United States of America, and has not in any way aided, abetted or given encouragement to rebellion against the Government, nor at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever was at war with the United States.

II.

That at all times herein mentioned from and after the 21st day of November, 1921, defendant was the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of the State of California, and the [2] person and official to whom the taxes and sums herein sought to be recovered, were paid as hereinafter set forth.

III.

That on or about March 30, 1918, plaintiff duly rendered in accordance with the provisions of law in that regard and the regulations of the Treasury of the United States to the then duly appointed,

qualified and acting Collector of Internal Revenue of the First District of California, its income tax return for the calendar year 1917 by filing same on said day in said First District. That in said return plaintiff corporation stated its taxable income for the calendar year to be $3,093,541.12, and stated its total tax liability for said calendar year to be $1,527,285.98. That at the time of filing said return said plaintiff paid to the then Collector of Internal Revenue of the First District of California the said sum of $1,527,285.98, as and for its income and excess profits tax for the calendar year 1917.

IV.

That the Commissioner of Internal Revenue did on or about the 24th day of June, 1920, forward to said plaintiff corporation a tentative determination of tax deficiency, wherein said plaintiff was advised that an additional claim for tax in the sum of $209,876.47 was asserted by the Commissioner of Internal Revenue by reason of an understatement of the net income of said plaintiff corporation on its said income and excess profits tax returns so filed for the calendar year 1917; that thereafter and within the time required by law, said plaintiff duly filed a protest to said tentative determination letter, which protest was thereafter considered by the said Commissioner of Internal Revenue, who on the 9th day of December, 1922, determined there was due from said plaintiff a deficiency tax of $257,443.30. That thereafter, to wit, on the 9th day of February,

1923, the said deficiency tax for the calendar year 1917 was first assessed and notice and [3] demand for said tax was for the first time on or about the 1st day of April, 1923 duly made of said plaintiff.

V.

That no other agreement, promise, waiver or undertaking of any kind in relation to said tax was at any time made or filed, advanced or offered in the premises by the said plaintiff corporation, save that on December 16, 1922, an unlimited assessment and collection waiver, copy of which is attached hereto, marked Exhibit "A" and by reference made a part hereof, for the tax for said calendar year 1917 was executed and shortly thereafter filed. Thereafter, however, and in February, 1923, the deficiency tax was for the first time placed on the assessment list and no abatement claim or bond was filed by the said plaintiff, nor was any action instituted by the defendant or by the Commissioner of Internal Revenue, or by the Government of the United States to collect a tax prior to December 7, 1925; on this date, the said plaintiff did execute and file an assessment waiver only for the said calendar year 1917, an exact copy of which is hereto attached, marked Exhibit "B" and by reference made a part hereof, which said assessment waiver was thereafter on November 29, 1926, duly extended by another assessment waiver, which gave the United States of America and its officer, the Commissioner of Internal Revenue, the right to reassess the tax

without reviving the Government's right to collect said tax already assessed, until December 31, 1927; exact copy of extension assessment waiver is attached hereto, marked Exhibit "C" and by reference made a part hereof. That thereafter on the 16th day of July, 1927, the defendant issued and delivered a second notice and demand, exact copy therefor attached hereto, marked Exhibit "D" and by reference made a part hereof, by which said defendant claimed a deficiency tax of $103,-111.16, said original deficiency of $257,443.33 having been further reduced in the sum of $38,545.05 for the [4] year 1917, and the sums of $64,702.14 and $47,251.57 for the years 1918 and 1919, respectively, by erroneously crediting such aggregate sum of $111,953.71 against said original deficiency without the consent of the plaintiff nor at his direction, said overpayments of tax appearing on Commissioner's Schedule 26069, of date June 30, 1927. Plaintiff claims no error in crediting the sum of $38,545.05 for the year 1917.

VI.

That said reassessment of tax was made on the erroneous assumption and said overpayment was occasioned by the following errors:

That the said defendant and the Commissioner of Internal Revenue erroneously assumed that the said unlimited assessment and collection waiver filed on or about the 21st day of December, 1923, Plaintiff's Exhibit "A," coupled with the said assessment waiver and extension thereof filed on

or about December 7, 1925 and November 29, 1926, being Plaintiff's Exhibits "B" and "C," extended the Government's right to assess the said income and excess profits tax of said plaintiff corporation at any time prior to December 31, 1927 and prevented the running and tolling of the limitation period provided by Section 250(d) of the Revenue Act of 1918 for the assessment and collection of the said tax, and further erred in crediting overassessments of tax for the years 1913, 1914, 1915, 1916, 1918 and 1919 against the determined deficiency for the year 1917.

VII.

That in order to save itself from having its property seized and levied on under distraint and sold, and further to avoid the imposition of penalties and interest and under compulsion, duress and coercion of the said defendant, the Collector of Internal Revenue in and for the First District of California, evidenced by his letter delivered to the plaintiff, bearing date [5] August 17, 1928, a copy of which is attached hereto, marked Exhibit "E," and by reference made a part hereof, the said plaintiff corporation did on, to wit, the 25th day of August, 1928, in the District aforesaid, pay to said defendant, Collector of Internal Revenue, the sum of $103,111.16 tax, and $26,808.90 interest, or a total sum of $129,920.06 covering said income and excess profits tax for the calendar year 1917 so demanded by the said defendant. Said payment of tax was made under specific protest and at the time of making said payment of

tax plaintiff then and there served formal notice of its written protest upon said defendant, a copy of which protest is attached hereto, marked Exhibit "F" and by reference made a part hereof.

VIII.

That heretofore and on the 23d day of October, 1928, the said plaintiff, Pacific Coast Steel Company, a corporation, duly and regularly filed with said defendant for transmittal to the Commissioner of Internal Revenue of the United States, a Claim for Refund of taxes so paid as income and excess profits taxes erroneously and illegally demanded and collected in the sum of $284,252.20, which said claim for refund duly filed as aforesaid specifically covered the identical allegations and specifications of error set forth by this said complaint and fully advised the said defendant and the Commissioner of the errors herein complained of. That said plaintiff corporation did thereby demand said sum from the said defendant, a true copy of said Claim for Refund being hereto attached, marked Exhibit "G" and by reference made a part hereof. That thereafter the said Commissioner of Internal Revenue of the United States having audited said Claim for Refund did on the 14th day of December, 1928, duly reject said Claim for Refund in its entirety, a true copy of said determination of said Commissioner and letter of rejection is hereto attached, marked Exhibit "H." [6]

IX.

That no other action has been had on said Claim

here sued upon in Congress, or by any department of the Government or in any Court, and plaintiff is the sole owner of said Claim sued upon here, and no person other than plaintiff is the owner of any part thereof or interest therein. That no assignment or transfer of said Claim or any part thereof or interest therein has been made by plaintiff or any other person; that plaintiff is therefore justly entitled to the amount herein claimed from said defendant after allowing all just credits and offsets.

X.

That said defendant has refused to refund or return any part of the said sum of $245,707.15 erroneously and illegally collected as set forth in this complaint, and by reason of the premises the defendant became and is indebteded to the plaintiff in the sum of $245,707.15, together with interest thereon at the rate of six per cent (6%) per annum as provided by law.

WHEREFORE, plaintiff prays for judgment in its favor against defendant in the sum of $245,707.15, together with interest at the rate of six per cent (6%) per annum as provided by law, and for its costs herein expended, and for such other and further relief *as the* Court may seem meet and proper in the premises.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff. [7]

State of California,
City and County of San Francisco,—ss.

E. S. Houdlette, being by me first duly sworn, deposes and says, that he is the vice-president of the Pacific Coast Steel Company, a corporation, plaintiff above named, and as such is authorized to verify the foregoing complaint; that he has read the foregoing complaint, or had the same read to him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

E. S. HOUDLETTE.

Subscribed and sworn to before me this 6th day of May, 1929.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California. [8]

EXHIBIT "A."

December 16, 1922.

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, PACIFIC COAST STEEL COMPANY, of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due

under any return made by or on behalf of the said Corporation, for the years 1911 to 1917, inclusive, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

[Seal] By E. M. WILSON, (Sgd.)
President.

_____,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [9]

EXHIBIT "B."

(74M)

TREASURY DEPARTMENT

Internal Revenue Service

Form 872A

INCOME AND PROFITS TAX WAIVER FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922

IT:E:SM

OBB–22907

A–22908

B–22909

Dec. 7, 1925.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL CO., a taxpayer of Rialto Bldg., San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919 and 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is

filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

_____,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [10]

EXHIBIT "C."

TREASURY DEPARTMENT
Internal Revenue Service
Form 872A

INCOME AND PROFITS TAX WAIVER
FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922.

November 29, 1926.

GC:I:II:C1

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-

profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

PACIFIC COAST STEEL COMPANY,

Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)

President.

_____,

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [11]

EXHIBIT "D."

INCOME, WAR-PROFITS, AND EXCESS-PROFITS TAX.

Second Notice and Demand for Tax.
Form 1-21-a—Revised Jan., 1920.

UNITED STATES INTERNAL REVENUE SERVICE.

Old Balance	Date	Tax	Amount Paid	Bal. Due	Remarks
$253,609.89	Claim for abatement allowed $38,545.02				
		ITA 26069			Add'l 1917 Income
Credit from 1918 tax—$64,702.14					
" " 1919 "		47,251.57			Feb. 1923—51/3
		Rejected—103,111.16			

Demand is hereby made for the payment of the taxes stated on this notice with a penalty of 5 per cent which has been incurred by failure to pay such taxes within the prescribed time. Beginning on the due date stated below, interest will also accrue at the rate of 1 per cent per month until paid. If payment of the tax, penalty, and interest is not received within ten days, the Act provides that collection with costs shall be made, by seizure and sale of property.

Due Date 2/27/23.

To avoid seizure and sale of property this tax must be paid to Collector of Internal Revenue at San Francisco not later than July 16, 1927.

Collector's
Paid Stamp

To the Collector of Internal Revenue:

I inclose herewith the amount of tax shown above plus penalty of 5 per cent and interest as follows:

Tax $103,111.16
5 Per Cent Penalty Int. 52
mos. @ ½% 26,808.90

Total Tax and Penalties $129,920.06

_____,
Date Signature of Taxpayer.

PACIFIC COAST STEEL COMPANY,
Rialto Building,
San Francisco, Calif.

Feb. 1923—51/3
Return This Form With Remittance. [12]

EXHIBIT "E."

TREASURY DEPARTMENT
Internal Revenue Service
San Francisco, Calif.

August 17, 1928.

Office of the Collector
First District of California

In replying refer to
Field Division—P. B. S.

Pacific Coast Steel Co.,
c/o Mr. H. H. Tooley,
Crocker Bdlg.,
San Francisco, Calif.

Gentlemen:

On July 27, 1928, the Commissioner of Internal Revenue communicated with the undersigned instructing him to collect the tax appearing on the February 1923 list in the amount of $103,111.16 and

stated that if said tax was not paid within thirty days to institute distraint proceedings.

Therefore, it is imperative that the tax be paid by Wednesday, August 22nd, 1928, or distraint proceedings will be instituted and liens filed in the United States District Court.

Respectfully,
JOHN P. McLAUGHLIN, (Sgd.)
Collector.

S:W. [13]

EXHIBIT "F."

August 23, 1928.

Collector of Internal Revenue,
Treasury Department,
Internal Revenue Service,
San Francisco, California.

Dear Sir:

Enclosed herewith you will find check made payable to you in the amount of $129,920.06, additional income and excess profits tax for the calendar year 1917 of $103,111.16, together with interest of $26,808.90.

This payment is not voluntarily made, but to avoid seizure and sale of the corporation's properties and is not an admission of the validity of the tax. On the contrary, it is our opinion that assessment and collection of the tax is barred by the Statute of Limitations and that therefore its collection is illegal.

Respectfully,
PACIFIC COAST STEEL COMPANY.
By E. S. HOUDLETTE, (Sgd.)
Vice-Pres.

Received on behalf of the above this 25th day of August, 1928.

PETER B. SHEEHAN, (Sgd.)
Deputy Collector of Internal Revenue. [14]

EXHIBIT "G."

REASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922
IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

(*EXE* SEPARATE FORM FOR EACH TAX PERIOD)

CLAIM FOR

- ☐ Abatement of Tax Assessed
- ☐ Credit Against Outstanding Assessments
- ☒ Refund of Taxes Illegally Collected
- ☐ Refund of Amounts Paid for Stamps Used in Error or Excess

COLLECTOR'S NOTATION
District

Account number

Date received

Stamp here

ate of California,
ty and County of San Francisco, } ss.

Notice to Collector
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit Stamp here

..... Collector of Internal Revenue

PACIFIC COAST STEEL COMPANY
(Name of taxpayer or purchaser of stamps.)

TYPE OR PRINT

Hunter-Dulin Building
(Residence—give street and number as well as city or town and State.)

San Francisco, California
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period Year
From: January 1, 1917
To: December 31, 1917

1. Business in which engaged .....
2. Character of assessment or tax Income and Profits Tax .....
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased Tax $257,443.30; Interest $26,808.90 ..... $284,252.20
4. Reduction of Tax Liability requested (Income and Profits Tax) ..... $.....
5. Amount to be abated ..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable) $284,252.20
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) .....
   (If statement covers income tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed 1st California.
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked; from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

The Pacific Coast Steel Company filed its return for the calendar year 1917 on March 30, 1918. On December 16, 1922, an unlimited assessment and collection waiver for said year was executed, and filed in the Bureau shortly thereafter. This waiver under Mimeograph 3085 (C.B.II – 1, 174) expired on April 1, 1924. In February, 1923, the tax was placed on the assessment list. No abatement claim or bond was filed by the taxpayer, nor was any action instituted by the Collector of the First California district to collect the tax prior to April 1, 1924. The collection of the tax was therefore barred not later than April 1, 1924 under the decision of the U. S. Supreme Court in the case of Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, affirmed 10 Fed. (2d) 1017 and 4 Fed. (2d) 604.

Under date of December 7, 1925, the corporation executed and filed an assessment waiver for the year 1917, which waiver was extended by another waiver executed under date of November 29, 1926. The latter waivers, which gave the Government the right to reassess the tax, but did not by inference or otherwise revive the Government's right to collect a tax already assessed, expired on December 31, 1927. The tax, however, was not reassessed and the Government's rights lapsed completely on said date.

The tax with interest of $26,808.90 was paid on August 25, 1928, under threat by the Collector at San Francisco of distraint proceedings. The taxpayer now demands the refund of $257,443.30 tax

and interest of $26,808.90, as the assessment and collection of the tax was barred by the limiting statutes at the time said collection was made.

See United States of America v. Harry Whyel and George Whyel and Daniel B. Heiner, Collector of Internal Revenue v. Henry Wilhelm Company, in the United States Circuit Court of Appeals for the Third Circuit, wherein it was held that collection of 1917 and 1918 taxes, assessed prior to the enactment of the 1924 Act, were barred under Section 277 (a) (2), Act of 1924, where proceedings were begun more than five years after the returns were filed, the time for beginning such proceedings not being extended by Section 278 (e) (2), Act of 1924.

See also Hood Rubber Co. v. Thomas W. White, Collector, District Court of the United States, District of Massachusetts, particularly the reference therein to the decision of the U. S. Board of Tax Appeals in the appeal of Sunshine Cloak and Suit Co., 10 B. F. A. 971. [15]

EXHIBIT "H."

TREASURY DEPARTMENT,
Washington.

December 1, 1928.

IT:C.
KCC.

Pacific Coast Steel Company,
Hunter-Dulin Building,
San Francisco, California.

Sirs:

Reference is made to your claim for refund

amounting to $284,252.20, representing Federal income and profits tax of $257,443.30 and interest of $26,808.90 alleged to have been overpaid for the year 1917.

The basis of the claim is that the tax was collected after the expiration of the statutory period of limitations on collection and is, therefore, refundable. You rely on the decision rendered by the United States Board of Tax Appeals in the case of the New York and Albany Lighterage Company.

The facts outlined by you are as follows:

Your 1917 return was filed on March 30, 1918. On December 16, 1922, you executed an unlimited assessment and collection waiver which by virtue of Commissioner's Mimeograph 3085, expired April 1, 1924. In February 1923, the tax in question was placed on the assessment list. On December 7, 1925, you executed an assessment waiver which waiver was extended by another assessment waiver dated November 29, 1926. The latter waiver expired December 31, 1927.

The records of the Bureau show that there was assessed in February 1923, an additional tax amounting to $257,443.33. The liability for this tax was satisfied as follows:

Cr.—Schedule 4536 dated February 21, 1923		
1914 overassessment	$729.40	
1915 overassessment	668.21	
1916 overassessment	2,102.99	3,500.60
Cr.—Schedule 4783 dated February 28, 1923		
1913 overassessment		332.81
Abated—Schedule 26069		38,545.05

Credited—Schedule 26069 dated June 30, 1927:		
	64,702.14	
	47,251.57	111,953.71
Paid—August 27, 1928		103,111.16
Total		$257,443.33
Interest paid—August 27, 1928		80,808.90

It is to be noted that the only collections made after April 1, 1924, were the collections made by credit, Schedule 26069, and the collection of tax and interest made on August 27, 1928.

Inasmuch as the period of limitations on assessment as extended by the waivers did not expire until subsequent to the enactment of the Revenue Act of 1926, the case for collection purposes falls within

Pacific Coast Steel Company 2

[16] the scope of Section 278(d) of the Revenue Act of 1926 under which the Commissioner has six years to collect a tax where the assessment was timely. In this connection, your attention is directed to Treasury Decision 4097 and General Counsel Memorandum 4445. Your attention is also directed to the decision rendered by the United States Board of Tax Appeals on June 13, 1928, in the case of the Ginn Coleman Company.

Your claim will, therefore, be rejected in full. The rejection will officially appear in the next schedule to be approved by the Commissioner.

Respectfully,
C. B. ALLEN,
Deputy Commissioner.
By CHARLES P. SUMAY, (Sgd.)
Head of Division.

[Endorsed]: Filed May 13, 1929. [17]

[Title of Court and Cause.]

ANSWER.

The defendant herein answering the complaint alleges:

I.

Admits the allegations of Paragraphs I and II of the complaint.

II.

Denies that the plaintiff duly rendered its income tax return for the year 1917. Admits that the plaintiff rendered its tax return on the date and in the manner and amount alleged in Paragraph III of the complaint.

III.

Answering the allegations of Paragraph IV of the complaint, defendant admits that said deficiency tax for the year 1917 amounting to $257,443.30 was determined on, and was assessed and notice and demand made upon the plaintiff as alleged in Paragraph IV of the complaint. For lack of informa-

tion and belief, defendant denies the remaining allegations of Paragraph IV of the complaint.

IV.

Answering the allegations of Paragraph V of the complaint, defendant denies that Exhibit "C" attached to the [18] complaint is an exact copy of the extension assessment waiver, made on November 29, 1926, and alleges that said Exhibit "C" is not a true copy of said extension assessment waiver. Denies that the credits allowed against said deficiency were erroneous.

V.

Answering the allegations of Paragraph VI of the complaint, denies that said reassessment of tax was erroneous.

VI.

Answering the allegations of Paragraph IX, defendant has no information or belief thereon and because of said lack of information and belief, denies each and every allegation therein. Denies that plaintiff is justly entitled to the amount demanded in the complaint.

VII.

Answering the allegations of Paragraph X, admits that defendant has refused to return or refund any part of the sum referred to. Denies that the same was erroneously and/or illegally collected; denies that defendant is indebted to the plaintiff in said sum or any part of it, together with interest.

Wherefore defendant prays for the complaint to be dismissed.

GEO. J. HATFIELD,
United States Attorney.
ESTHER B. PHILLIPS,
Asst. U. S. Attorney. [19]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Esther B. Phillips, being first duly sworn, deposes and says:

That she is one of the Assistant United States Attorneys for the Northern District of California, one of the attorneys for the defendant in the above-entitled action; that the defendant is temporarily absent from San Francisco and is absent from California; that affiant makes this verification in his behalf for said reasons; that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

ESTHER B. PHILLIPS.

Subscribed and sworn to before me this 30th day of September, 1929.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Exact copy received this 20 day of October, 1929.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attys. for Plaintiff.

Filed Oct. 10, 1929. [20]

[Title of Court and Cause.]

STIPULATION WAIVING JURY TRIAL.

IT IS HEREBY STIPULATED AND AGREED that trial by jury herein is waived and that this case may be tried by the Court sitting without a jury.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
ESTHER B. PHILLIPS,
Asst. United States Attorney,
(Attorneys for Defendant).

Dated: January 13, 1930.

[Endorsed]: Filed Jan. 13, 1930. [21]

[Title of Court and Cause.]

NOTICE OF FILING BILL OF EXCEPTIONS.

To the Defendant, John P. McLaughlin, and His Attorneys:

Please take notice that we have this day filed the

bill of exceptions in the above cause, copy of which is now handed you, and you are further notified that said bill of exceptions will be presented to the above-entitled court for settlement and approval on the 5 day of August, 1931, at 9:30 o'clock, P. M.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.

Service of above notice and copy of plaintiff's bill of exceptions, referred to therein, acknowledged this 5 day of August, 1931.

GEO. J. HATFIELD,
ESTHER B. PHILLIPS,
Attorneys for Defendant. [22]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

The above-entitled cause came on for hearing before the above-entitled court, sitting without a jury, Honorable Harold Louderback, Judge, presiding, on the 13th day of January, 1930, there being present the plaintiff, by its counsel, Claude I. Parker and Ralph W. Smith, and the defendant, by his counsel, Geo. J. Hatfield, United States Attorney, and Esther B. Phillips, Assistant United States Attorney.

At the trial, it was stipulated by counsel for the respective parties that the allegations of fact contained in plaintiff's complaint were true and correct with the exception that the form of waiver attached

to said complaint as a part thereof, as Exhibit "C," was not a true and correct copy of the waiver. Whereupon defendant introduced in evidence, without objection, a true and correct copy of the waiver which was filed on or about November 29, 1926, with the Commissioner of Internal Revenue, which waiver in form and substance is as follows: [23]

DEFENDANT'S EXHIBIT "A."

"INCOME AND PROFITS TAX WAIVER.

For Taxable Years Ended Prior to January 1, 1922.

CC:I:II:C1

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

Said waiver was marked Defendant's Exhibit "A."

No further evidence was introduced.

Counsel for plaintiff then moved for judgment for plaintiff, which motion was taken under submission for consideration by the Court. Counsel for defendant moved for judgment for defendant, which motion was likewise taken under submission for consideration by the Court.

Under date of July 27, 1931, the Court rendered its decision and order for judgment for the defendant upon findings of fact and conclusions of law to be filed.

Thereupon defendant filed with the Court his proposed findings of facts and conclusions of law. In due course, plaintiff lodged with the [24] *the* Court its amendments to defendant's proposed findings of facts and also its counter proposed conclusions of law, as follows:

Comes now the plaintiff and respectfully requests this Honorable Court to adopt the following amendments to defendant's proposed findings of fact:

1. That in lieu of Paragraph IV of defendant's proposed findings of fact there be adopted as Paragraph IV of the Court's findings, the following:

IV.

On December 16, 1922, the plaintiff filed with

the then acting Commissioner of Internal Revenue a waiver, a true copy of which was attached to the complaint in this proceeding, marked Exhibit "A," and by this reference is hereby made a part hereof. On December 7, 1925, the plaintiff filed with the then acting Commissioner of Internal Revenue a form of waiver, a true and correct copy of which is attached to the complaint in this proceeding, marked Exhibit "B," and by this reference is hereby made a part hereof. On November 29, 1926, the plaintiff filed with the then acting Commissioner of Internal Revenue a waiver which in form and substance is as follows:

"EXHIBIT 'C.'

INCOME AND PROFITS TAX WAIVER.
For Taxable Years Ended Prior to January 1, 1922.

CC:I:II:C1.

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts. [25]

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer *of* officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

No abatement claim or bond was filed by plaintiff, nor was any agreement or waiver made other than those referred to herein. No proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925, upon which date the plaintiff filed a waiver as hereinbefore referred to.

2. That in lieu of Paragraph V of defendant's proposed findings of fact there be adopted as Paragraph V of the Court's findings, the following:

V.

On or about July 16, 1027, the defendant made in writing a second notice and demand upon the plaintiff, wherein defendant claimed a deficiency tax due from plaintiff amounting to $103,111.16 and interest of $26,808.90, or a total of $129,920.06, upon its tax liability for 1917, said original defi-

ciency of $257,443.33 having been reduced by a credit of $3,500.60, being an overpayment for the years 1914, 1915 and 1916, said credit being made under date of February 21, 1923, and by a credit in the amount of $332.81, being an overpayment of tax for 1913, said credit having been made under date of February 28, 1923; and by an abatement or reduction of the 1917 original deficiency in [26] the amount of $38,545.05; and by credits totaling $111,953.71, being overpayment of tax for the years 1918 and 1919, said credits being made under date of June 30, 1927.

On August 27, 1928, plaintiff paid to the defendant the sum of $103,111.16, and interest in the sum of $26,808.90, to apply against the determined deficiency for 1917. At the time of making said payment the plaintiff served upon the defendant written protest that the payment of said tax was made to avoid seizure and sale of the plaintiff's properties.

COUNTER CONCLUSIONS OF LAW.

Plaintiff further respectfully requests the Court to adopt the following as its conclusion of law from the findings of fact:

I.

That the statutory period within which the Commissioner of Internal Revenue was obliged to make collection of the deficiency in tax proposed against this plaintiff for the year 1917 was not extended by the waivers filed by the plaintiff with the said Commissioner of Internal Revenue under dates of December 7, 1925, and November 29, 1926.

II.

That the payment of $111,953.71 made by the plaintiff on June 30, 1927, against the 1917 deficiency, by virtue of the credit applied on that date against the 1917 deficiency by said Collector of Internal Revenue of overpayments of tax by the plaintiff of its 1918 and 1919 tax liability, in the amount of $111,953.71, was made after the statute of limitations on collections had barred the right of the Commissioner to enforce collection of said 1917 deficiency; and that likewise, payment made by the plaintiff on August 27, 1928, against the 1917 deficiency of $103,111.16, plus interest thereon of $26,808.90, was made after the statute of limitations had barred the right of the Commissioner from enforcing collection of said 1917 deficiency. [27]

III.

That said payments of $111,953.71 and $103,111.16 made by the plaintiff on its 1917 deficiency, together with the interest thereon of $26,808.90, constituted an overpayment by the plaintiff and is refundable.

IV.

That plaintiff recover from defendant the amount of said overpayment, together with interest thereon, as provided by law.

Upon hearing had, counsel for plaintiff moved the Court to adopt its proposed amendments to defendant's proposed findings of fact, and further, to adopt its counter-conclusions of law. The Court thereupon denied said motion, and allowed plaintiff's counsel's exception to be noted on the record.

Thereupon, counsel for defendant moved the Court that it adopt defendant's proposed findings of fact and conclusions of law, which motion was granted by the Court over plaintiff's objections that said conclusions of law were not supported by the findings of fact and were contrary to law. Plaintiff's objections were overruled and plaintiff's exceptions to said ruling were properly allowed and noted.

The foregoing is the substance of all evidence adduced at the trial and of further proceedings had in this cause.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff and Appellant. [28]

ORDER ALLOWING BILL OF EXCEPTIONS.

The foregoing contains the substance of all the stipulations and evidence given on the trial and hearing of this cause, and of further proceedings had, and each of the exceptions stated to have been taken by the counsel for the plaintiff were so taken and were duly allowed and noted by the Court, and, in order that each and every one thereof may be preserved and made of record, this bill of exceptions is duly stated, approved, and signed, and ordered to be made of record in the above-entitled cause this 5 day of August, 1931.

HAROLD LOUDERBACK,
United States District Judge. [29]

[Title of Court and Cause.]

STIPULATION TO BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions was presented by plaintiff within the time allowed by law therefor, and that the same is a true and correct statement of the proceedings had at the trial and after trial of the above-entitled action, and that the same may be certified, allowed and settled as provided by law and the practice of the above-entitled court.

Dated this 5 day of August, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff and Appellant.
GEO. J. HATFIELD,
ESTHER B. PHILLIPS,
Attorneys for Defendant and Appellee.

[Endorsed]: Filed Aug. 5, 1931. [30]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled case came regularly on for trial and hearing on the 13th day of January, 1930, before the above-entitled court, sitting without a jury, Honorable Harold Louderback presiding, a written waiver of jury signed by both parties

having been filed, Ralph W. Smith appearing as attorney for the plaintiff, and Geo. J. Hatfield, United States Attorney, and Esther B. Phillips, Assistant United States Attorney, appearing as attorneys for the defendant, and trial being had, and said cause being submitted to the court for decision, and the court having considered the facts and the arguments of counsel, does now make the following:

FINDINGS OF FACT.

I.

The allegations contained in Paragraphs I and II of the complaint are true.

II.

On or about March 30, 1918, the plaintiff filed its income tax return for the calendar year 1917 with the then duly appointed, qualified and acting Collector of Internal Revenue [31] of the First District of California. In said return, plaintiff stated its income for the calendar year 1917 to be $3,093,541.12, and stated its total tax liability for said calendar year to be $1,527,285.98. At the time of filing said return, plaintiff paid to the then acting Collector of Internal Revenue of the First District of California, the sum of $1,527,285.98 as and for its income and excess profits taxes for the calendar year 1917.

III.

On June 24, 1920, the Commissioner of Internal Revenue forwarded to the plaintiff a tentative determination of tax deficiency in which the plaintiff

was advised that an additional claim for taxes in the sum of $209,876.47 was asserted by the Commissioner of Internal Revenue because of an understatement of the net income of the plaintiff in its said income and excess profits tax return so filed for the calendar year 1917. On December 9, 1922, the Commissioner determined that a deficiency tax was due from the plaintiff for said calendar year, amounting to $257,443.30. On February 9, 1923, a deficiency tax in said amount ($257,443.30) for the calendar year 1917 was assessed, and on or about April 1, 1923, notice and demand for payment of said tax was made of plaintiff.

IV.

On December 16, 1922, the plaintiff entered into a written agreement with the then acting Commissioner of Internal Revenue, whereby the plaintiff consented to a determination, assessment and collection of the amount of income, excess profits, or war profits taxes due under any return made by or on behalf of the plaintiff for the years 1911 to 1917, inclusive, under the Revenue Act of 1921, or under prior income, excess profits or war profits tax acts, or under Section 38 of the Act of August 5, 1909, entitled "An Act to provide Revenue, etc." [32] irrespective of any period of limitations. On December 7, 1925, the plaintiff and the Commissioner entered into a written agreement whereby the plaintiff waived the time prescribed by law for making any assessment of the amount of income, excess profits, or war profits taxes due under

any return made by or on behalf of the plaintiff for the years 1917, 1918, 1919 and 1920, this waiver of the time for making assessment as aforesaid, to remain in effect until December 31, 1926. On November 19, 1926, the plaintiff and the Commissioner of Internal Revenue entered into a written agreement whereby the time prescribed by law for making any assessment of the amount of income, excess profits, or war profits taxes due under any return made by or for the plaintiff for the year 1917 under existing or prior revenue acts was waived, said waiver of the time for making such assessment to remain in effect until December 31, 1927. No abatement claim or bond was filed by plaintiff nor was any agreement or waiver made other than those referred to herein. No proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925.

V.

On or about July 16, 1927, the defendant made in writing a second notice and demand upon the plaintiff, wherein defendant claimed a deficiency tax due from plaintiff amounting to $103,111.16, and $26,808.90, or a total of $129,200.06, upon its tax liability for 1917. In said notice and demand defendant gave notice to plaintiff that certain overpayments for taxes in 1918 and 1919 were allowed as credits upon the deficiency for 1917. On August 27, 1928, plaintiff paid to the defendant the sum of $103,111.16 and interest in the sum of $26,808.90, to apply against the determined deficiency for 1917. At the time of making said payment the

plaintiff served upon the defendant a written protest. Payment of said tax was made to [33] avoid seizure and sale of the plaintiff's properties.

VI.

On October 23, 1928, plaintiff filed with the defendant for transmittal to the Commissioner of Internal Revenue of the United States a claim for refund of taxes so paid as income and excess profits taxes in the sum of $284,252.20, said claim for refund being made upon the grounds and specifications of error set forth in the complaint filed in this suit. The Commissioner of Internal Revenue rejected said claim for refund in its entirety on or about December 14, 1928.

VII.

Plaintiff is the sole owner of the claim sued upon herein, no assignment or transfer of said claim or any part thereof or any interest therein having been made by the plaintiff. No other action has been had on the claim here sued upon either in Congress or by any department of the Government or in any court. The defendant has refused to refund or return any part of the amount in suit.

As its conclusion of law from the foregoing facts the court further finds its

CONCLUSION OF LAW.

That defendant is entitled to a judgment in his favor, together with costs as may be taxed. Let judgment be entered accordingly.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Received copy of within findings this 30th day of July, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.

Filed Aug. 5, 1931. [34]

[Title of Court and Cause.]

AMENDMENTS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND COUNTER PROPOSED CONCLUSIONS OF LAW.

Comes now the plaintiff and respectfully requests this Honorable Court to adopt the following amendments to defendant's proposed findings of fact:

1. That in lieu of Paragraph IV of defendant's proposed findings of fact there be adopted as Paragraph IV of the Court's findings, the following:

IV.

On December 16, 1922, the plaintiff filed with the then acting Commissioner of Internal Revenue a waiver, a true copy of which was attached to the complaint in this proceeding, marked Exhibit "A," and by this reference is hereby made a part hereof. On December 7, 1925, the plaintiff filed with the then acting Commissioner of Internal Revenue a form of waiver, a true and correct copy of which is attached to the complaint in this proceeding, marked Exhibit "B," and by this reference is

hereby made a part hereof. On November [35] 29, 1926, the plaintiff filed with the then acting Commissioner of Internal Revenue a waiver which in form and substance is as follows:

"EXHIBIT 'C.'

INCOME AND PROFITS TAX WAIVER.

For Taxable Years Ended Prior to January 1, 1922.

GC:I:II:C.

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer.

(Seal) By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of

the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

No abatement claim or bond was filed by plaintiff, nor was any agreement or waiver made other than those referred to herein. No proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925, upon which date the plaintiff filed a waiver as hereinbefore referred to.

2. That in lieu of Paragraph V of defendant's proposed findings of fact there be adopted as Paragraph V of the Court's findings, the following: [36]

V.

On or about July 16, 1927, the defendant made in writing a second notice and demand upon the plaintiff, wherein defendant claimed a deficiency tax due from plaintiff amounting to $103,111.16 and interest of $26,808.90, or a total of $129,920.06, upon its tax liability for 1917, said original deficiency of $257,443.33 having been reduced by a credit of $3,500.60, being an overpayment for the years 1914, 1915 and 1916, said credit being made under date of February 21, 1923; and by a credit in the amount of $332.81, being an overpayment of tax for 1913, said credit having been made under date of February 28, 1923; and by an abatement or reduction of the 1917 original deficiency in the amount of $38,545.05; and by credits totaling $111,953.71, being overpayment of tax for the years 1918 and 1919, said credits being made under date of June 30, 1927.

On August 27, 1928, plaintiff paid to the defendant the sum of $103,111.16, and interest in the sum of $26,808.90, to apply against the determined deficiency for 1917. At the time of making said payment the plaintiff served upon the defendant written protest that the payment of said tax was made to avoid seizure and sale of the plaintiff's properties.

COUNTER CONCLUSIONS OF LAW.

Plaintiff further respectfully requests the Court to adopt the following as its conclusion of law from the findings of fact:

I.

That the statutory period within which the Commissioner of Internal Revenue was obliged to make collection of the deficiency in tax proposed against this plaintiff for the year 1917 was not extended by the waivers filed by the plaintiff with the said Commissioner of Internal Revenue under dates of December 7, 1925 and November 29, 1926.

II.

That the payment of $111,953.71 made by the plaintiff on June 30, [37] 1927 against the 1917 deficiency, by virtue of the credit applied on that date against the 1917 deficiency by said Collector of Internal Revenue of overpayments of tax by the plaintiff of its 1918 and 1919 tax liability, in the amount of $111,953.71, was made after the statute of limitations on collections had barred the right of the Commissioner to enforce collection of said 1917 deficiency; and that likewise, payment made by the plaintiff on August 27, 1928, against the

1917 deficiency of $103,111.16, plus interest thereon of $26,808.90, was made after the statute of limitations had barred the right of the Commissioner from enforcing collection of said 1917 deficiency.

III.

That said payments of $111,953.71 and $103,111.16 made by the plaintiff on its 1917 deficiency, together with the interest thereon of $26,808.90, constituted an overpayment by the plaintiff and is refundable.

IV.

That plaintiff recover from defendant the amount of said overpayment, together with interest thereon, as provided by law.

_____,

United States District Judge.

[Endorsed]: Service acknowledged this 3d day of August, 1931.

GEO. J. HATFIELD.
By ESTHER B. PHILLIPS,
Asst. U. S. Atty.

Lodged Aug. 3, 1931. [38]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,425–L.

PACIFIC COAST STEEL COMPANY, a Corporation,

Plaintiff,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California,

Defendant.

JUDGMENT ON FINDINGS.

This cause having come on regularly for trial on the 13th day of January, 1930, before the Court sitting without a jury, a jury having been waived by written stipulation filed, Ralph W. Smith, Esquire, appearing as attorney for plaintiff, and Esther B. Phillips, Assistant United States Attorney, appearing as attorney for defendant, and the trial having been proceeded with and oral and documentary evidence having been introduced and closed, and the cause having been submitted to the Court for consideration and decision; and the Court after due deliberation having rendered its decision and filed its findings, and ordered that judgment be entered in favor of defendant and for costs in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by

the Court that plaintiff take nothing by this action and that defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at $16.00.

Judgment entered this 5th day of August, 1931.

WALTER B. MALING,
Clerk. [39]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now the Pacific Coast Steel Company, appellant herein, and shows that on the 27th day of July, 1931, the above-entitled court rendered its decision pursuant to which judgment in favor of defendant was duly entered on the 5th day of August, 1931, and that in and by said decision and judgment and the proceedings prior thereto certain manifest errors were committed to the prejudice of this appellant, all of which will more fully appear from the assignment of errors filed by the appellant herewith.

WHEREFORE, this appellant prays that an appeal may be allowed in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a citation be issued as by law provided commanding the defendant to appear before the said Circuit Court of Appeals; and appellant further prays that an order be made fixing the amount of the cost bond which appellant shall give and furnish upon said appeal, and that a transcript

of the record, proceedings, and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Appellant.

[Endorsed]: Due service by copy admitted Aug. 18, 1931.

GEO. J. HATFIELD,
U. S. Attorney,
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney,
Attys. for Defendant.

Filed Aug. 18, 1931. [40]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the plaintiff, Pacific Coast Steel Company, and files the following assignment of errors upon which it will rely upon its petition for review of the decision and judgment entered by the above-entitled court in the above-entitled cause on the 5th day of August, 1931.

I.

That said Court erred in rendering and entering its decision and judgment in favor of the defendant and appellee, and against plaintiff and appellant,

in that said decision and judgment is contrary to law.

II.

That said Court erred in denying plaintiff's motion for judgment, since under the law plaintiff is entitled to recovery in this action.

III.

That said Court erred in refusing to adopt plaintiff's amendments to defendant's proposed findings of fact since said [41] amendments are in accord with the facts brought out in the trial of this proceeding.

IV.

That said Court erred in refusing to adopt plaintiff's counter conclusions of law since said counter conclusions of law are true conclusions of the law applicable to the issue involved in this proceeding.

V.

That said Court erred in finding that the waivers dated December 7, 1925, and November 29, 1926, constituted valid and effective agreements extending the limitation period within which the Commissioner of Internal Revenue might enforce collection of the 1917 deficiency tax assessed against the plaintiff on February 9, 1923.

VI.

That said Court erred in failing to find as a matter of law that the collection of the unpaid balance of the 1917 deficiency in tax of $215,064.87 (original deficiency of $257,443.33 reduced by an abate-

ment of $38,545.05 and by credits of overpayments of 1913 to 1916 taxes of $3,833.41) was barred by operation of the statute of limitations under Section 250(d) of the Revenue Act of 1921.

VII.

That said Court erred in failing to find as a matter of law that the payment made by the plaintiff of $111,953.71 on June 30, 1927, was an overpayment which is refundable and recoverable in this proceeding.

VIII.

That said Court erred in failing to find as a matter of law that the payments made by the plaintiff of $103,111.16 plus interest thereon of $26,808.90 on August 27, 1928, were overpayments which are refundable and recoverable in this proceeding. [42]

IX.

That even if the waivers extended the period of limitations against collection, the Court erred in failing to find as a matter of law that the collection of the $103,111.16 plus interest of $26,808.90 on August 27, 1928, was unwarranted since the final waiver by its terms extended the period for collection to December 31, 1927, and no later, and said collection on August 27, 1928, was made beyond the time agreed upon as the limitation for collection, and was therefore illegal, and the amount paid at that time is here*f*ore an overpayment properly refundable and recoverable in this action.

WHEREFORE, said plaintiff prays that the judgment of the said District Court be reversed

and said case remanded to said Court with instructions to enter a judgment in favor of the plaintiff herein for the recovery of the overpayment of its income and excess profits taxes for the year 1917 in the amount of $241,873.77 plus interest thereon as provided by law, or to enter such other decree in said cause as in the opinion of the United States Circuit Court of Appeals for the Ninth Circuit is deemed meet and proper.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff.

[Endorsed]: Due service by copy admitted the 18th day of August, 1931.

GEO. J. HATFIELD,
U. S. Atty.,
By ESTHER B. PHILLIPS,
Asst. U. S. Atty.,
Attys. for Defendant.

Filed August 18, 1931. [43]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST BOND.

Messrs. Claude I. Parker and Ralph W. Smith, attorneys for plaintiff and appellant, in the above-entitled cause, having filed herein and presented to the Court plaintiff's petition for appeal (together with its assignment of errors) praying for the allowance of an appeal bringing up for review to the

United States Circuit Court of Appeals for the Ninth Circuit the proceedings, decision and judgment rendered by the Southern Division of the United States District Court for the Northern District of California herein, and praying further for an order fixing the amount of cost bond, and for an order for issue of citation and for transmittal of the record to said United States Circuit Court of Appeals—

IT IS ORDERED that the appeal as prayed for in said petition be, and the same is hereby allowed for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision and judgment of the above-entitled court referred to in said petition, and that the amount of the cost bond to be given by said appellant upon appeal be, and the same is hereby fixed at the sum of Two Hundred and Fifty Dollars ($250.00).

IT IS HEREBY FURTHER ORDERED that a duly authenticated transcript of the record, proceedings, and papers in this cause, [44] be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Due service admitted by copy, August 18, 1931.

GEO. J. HATFIELD,
U. S. Attorney,
By ESTHER B. PHILLIPS,
Attorneys for Defendant.

Filed Aug. 18, 1931. [45]

[Title of Court and Cause.]

THE PREMIUM CHARGE IS $10.00 PER ANNUM.

COMMERCIAL CASUALTY INSURANCE COMPANY.

Bond No. 200,918.

NEWARK, NEW JERSEY.

UNDERTAKING FOR COSTS ON APPEAL.

WHEREAS, in an action in the Southern Division of the United States District Court for the Northern District of California, a judgment was, in the fifth day of August, 1931, rendered by the said Court in favor of the defendant, and against the said plaintiff and appellant, Pacific Coast Steel Company, a corporation, and

WHEREAS, the said plaintiff and appellant is dissatisfied with the said judgment, and is desirous of appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, in consideration of the premises, and of such appeal the Commercial Casualty Insurance Company, a corporation, having its principal place of business in the State of New Jersey, duly incorporated under the laws of the State of New Jersey, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California respecting such

corporations, does hereby undertake in the sum of Two Hundred Fifty and No/100ths Dollars ($250.00), and promise on the part of the appellant that said appellant will pay all damages and costs which may be awarded against it on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of Two Hundred Fifty and No/100ths Dollars ($250.00), to which amount it acknowledges itself bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to the Commercial Casualty Insurance Company, of not less than ten days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor. [46]

Dated at San Francisco, California, this 17th day of August, A. D. 1931.

COMMERCIAL CASUALTY INSURANCE COMPANY.

By F. W. NEFF. (Sgd.) [Seal]
(F. W. NEFF),
Attorney-in-fact.

Approved this 18th day of August, A. D. 1931.

HAROLD LOUDERBACK,
District Judge.

State of California,
City and County of San Francisco,—ss.

On this 17th day of August, in the year one thousand nine hundred and thirty-one, before me, Emily K. McCorry, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared F. W. Neff, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Commercial Casualty Insurance Company (a Corporation) and acknowledged to me that he subscribed the name of said Commercial Casualty Insurance Company thereto as surety and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of San Francisco, California.

My commission expires January 16, 1935.

[Endorsed]: Filed Aug. 19, 1931. [47]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Southern Division of the United States District Court for the Northern District of California:

You will please prepare and within thirty days from the date of issue of the citation on appeal of the above-entitled cause, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit duly authenticated copies of the following documents:

1. All docket entries of proceedings before the court, including all court orders.
2. Pleadings before the court.
3. Findings of fact and conclusions of law.
4. Plaintiff's proposed amendments of findings of fact and counter conclusions of law.
5. Bill of exceptions.
6. Petition for and order allowing appeal, and fixing amount of bond.
7. Assignment of errors.
8. Cost bond.
9. Praecipe for transcript of record.
10. Citation on appeal.
11. Clerk's certificate.

The foregoing to be prepared and duly authenticated, and [48] transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 18, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff. [49]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE.

To GEORGE J. HATFIELD, United States Attorney, and ESTHER B. PHILLIPS, Assistant United States Attorney, Attorneys for Defendant and Appellee:

Please take notice that on the 18 day of August, 1931, we filed with the Clerk of the above-entitled court a praecipe designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit on the appeal taken in the above cause, a copy of which praecipe is hereto annexed and herewith served upon you.

Dated this 18 day of August, 1931.

CLAUDE I. PARKER,
RALPH W. SMITH,
Attorneys for Plaintiff and Appellant,
808 Bank of America Bldg.,
Los Angeles, California.,

Service of the foregoing notice and copy of the praecipe is hereby acknowledged this 18 day of August, 1931.

GEO. J. HATFIELD,
ESTHER B. PHILLIPS,
Attorneys for Defendant and Appellee.

[Endorsed]: Due service by copy admitted this 18th day of August, 1931.

GEO. J. HATFIELD,
U. S. Atty.,
By ESTHER B. PHILLIPS,
Asst. U. S. Atty.,
Attys. for Defendant.

August 19th, 1931. [50]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 50 pages, numbered from 1 to 50, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $10.50; that the said amount was paid by the plaintiff and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 27th day of August, 1931.

WALTER B. MALING,
Clerk, United States District Court for the Northern District of California. [51]

[Title of Court and Cause.]

CITATION ON APPEAL.

To JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, within thirty (30) days from the date hereof, pursuant to an order allowing appeal, filed in the Clerk's office of the above-entitled court, wherein the Pacific Coast Steel Company is appellant, and you are appellee, to show cause, if any there be, why the decision rendered against the said appellant as in the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

HAROLD LOUDERBACK,
United States District Judge.

Dated August 18th, 1931.

Service of the within citation and receipt of a copy is hereby admitted this —— day of August, 1931.

_____,

_____,

Attorneys for Defendant and Appellee.

Filed Aug. 19, 1931.

Due service by copy admitted this 18th day of August, 1931.

GEO. J. HATFIELD,
U. S. Atty.,
ESTHER B. PHILLIPS,
Assistant U. S. Attny.,
Attnys. for Defendant. [52]

[Endorsed]: No. 6595. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Steel Company, a Corporation, Appellant, vs. John P. McLaughlin, United States Collector of Internal Revenue for the First Collection District of California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 27, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6595

PACIFIC COAST STEEL COMPANY, a Corporation,

Appellant,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California,

Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twentieth day of January, in the year of our Lord one thousand nine hundred and thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. George H. Koster, counsel for appellant, and by Miss Esther B. Phillips, Assistant U. S. Attorney, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for respective parties to file further briefs 10 x 10.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-second day of August, in the year of our Lord one thousand nine hundred and thirty-two.

Present: The Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding; Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in the above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before: WILBUR and SAWTELLE, Circuit JJ., and McCORMICK, J.

McCORMICK, District Judge.

A corporate taxpayer, Pacific Coast Steel Company, brought this action at law in the District Court for the Northern District of California for the recovery of income and excess profit taxes for the calendar year of 1917, claiming that said taxes were illegally assessed and collected as deficiency taxes. Pursuant to stipulation, the case was tried by the Court, sitting without a jury, and upon special findings, a judgment was entered for the defendant. The taxpayer has prosecuted this appeal from the judgment, and the sole issue is whether or not collections of taxes on June 30, 1927, and August 27, 1928, respectively, were made after the applicable periods of limitation had barred the right of the Collector to make them.

The pertinent facts found by the Court below are as follows:

On March 30, 1918, plaintiff filed its income and profit tax return for the calendar year, 1917.

On June 24, 1920, the Commissioner of Internal Revenue forwarded to plaintiff a tentative deter-

mination of tax deficiency wherein plaintiff was notified that the Commissioner asserted a claim of $209,876.47, for deficiency taxes because of an understatement by plaintiff in the return of March 30, 1918.

On December 9, 1922, the Commissioner determined that the correct amount of deficiency tax that was due from the plaintiff for said calendar year 1917, was $257,443.30.

On December 16, 1922, plaintiff and the acting Commissioner of Internal Revenue entered into a written agreement whereby the plaintiff consented to a determination, assessment and collection of income, excess profits or war profit taxes due under any return made by or on behalf of it for the years 1911 to 1917, inclusive, under the Revenue Act of 1921 or under prior tax Acts irrespective of any period of limitations.

On February 9, 1923, the deficiency tax of $257,-443.30, was assessed against plaintiff for the calendar year 1917, and, on April 1, 1923, notice and demand for the payment of such deficiency tax was made upon plaintiff but no proceeding to collect a deficiency tax for 1917 was instituted prior to December 7, 1925, when by a written instrument executed by plaintiff and the Commissioner the plaintiff waived until December 31, 1926, the time prescribed by law for making any assessment of the amount of income, excess profits or war profits taxes due under any return made by or on behalf of it for the years 1917 to 1920, inclusive, under

existing or prior Revenue Acts, and again on November 29, 1926, by a similar writing, the plaintiff extended the period of waiver of time for making any assessment of said taxes under any return made by or on behalf of it for the year 1917 under existing or prior Revenue Acts until December 31, 1927.

A second notice and demand was made upon plaintiff on or about July 16, 1927, wherein defendant collector claimed a deficiency tax due from plaintiff in the sum of $129,920.06, upon its tax liability for 1917. In this notice and demand, plaintiff was informed that overpayments by it of taxes in 1918 and 1919, including the amount of $111,953.71, had been on June 30, 1927, credited upon the deficiency tax of 1917.

On August 27, 1928, plaintiff under written protest and to avoid seizure and sale of its property paid to the defendant collector $103,111.16, as deficiency taxes due and interest in the further sum of $26,808.90, the entire amount of $129,920.06, to apply against the determined deficiency taxes due from the plaintiff for the calendar year 1917. On October 23, 1928, plaintiff filed with the defendant collector for transmittal to the Commissioner of Internal Revenue, a demand and claim of refund for taxes so paid as income and excess profits taxes and interest thereon in the aggregate sum of $284,-252.20 upon the ground that the assessment and the collection of such taxes was illegal and barred by the statutes of limitations. The Commissioner on December 14, 1928, rejected entirely said claim for

refund, refused to return any part of said sum of money, and plaintiff thereupon brought this action.

When plaintiff filed its income tax return on March 30, 1918, the time within which the amounts of any tax due thereunder could be assessed or collected was controlled by Section 250 (d) of the Revenue Act of 1918, Chap. 18, 40 Stat. at L., 1057, 1083, which as far as applicable to this appeal reads:

> "Section 250 (d). Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or made and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * *."

When the assessment of February 9, 1923, involved in this appeal, was made and applicable to it, there was in effect the Revenue Act of 1921, 42 Stat. at L., 227, 265. Section 250 (d) thereof as far as it is applicable here, reads:

> "The amount of income, excess profits or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under

> prior income, excess profits or war profits tax acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income excess profits, or war profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act, * * *."

It is conceded by appellant that the assessment of the additional tax of $257,443.30 having been made February 9, 1923, was timely, and no question is raised by the taxpayer on the claims for refund or in the pleadings in the Court below, and none is urged here, against the regularity or validity of this assessment.

Moreover, notwithstanding the waiver was according to its terms unlimited in time, it is indisputable that under the decisions of the Supreme Court in Aiken v. Burnet, 282 U. S., 279, and Stange v. U. S., 282 U. S., 270, and pursuant to regulations of the Commissioner of Internal Revenue promulgated April 11, 1923, Mim. 3085, I. R. Cum. Bull. II-1, p. 174, the voluntary waiver dated December 16, 1922, extended the time for both assessment and collection of the 1917 taxes only to

April 1, 1924. This was because a departmental ruling terminated all such waivers April 1, 1924.

The appellant contends, however, that the Court below erred in holding that the second waiver—the one executed on December 7, 1925,—operated retroactively to extend the time in which the collection of taxes assessed on February 9, 1923, could be made. In other words, the argument is that because the waiver of December 16, 1922, expired April 1, 1924, all right to subsequently collect the taxes that were validly assessed on February 9, 1923, ceased when the Revenue Act of 1924 became law by reason of the terms of that Act and specifically because of Subdivisions (c), (d) and (e) of Section 278 thereof.

The 1924 Act, 43 Stat. at L., 253, became effective on June 2, 1924. Section 277 (a) thereof, as far as material to this appeal, states:

> "Except as provided in Section 278 and in subdivision (b) of Section 274 and in subdivision (b) of Section 279 (274 and 279 are not involved in this appeal) * * * (2) The amount of income, excess-profits, and war profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended shall be assessed within five years after the return was filed and no proceeding in Court for the collection of such taxes shall be begun after the expiration of period."

Section 278 (c), (d) and (e), respectively, of the Act provide,

"(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

"(d) Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected by distraint or by a proceeding in Court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in Court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

"(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in Court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in Court begun, before the enactment of this Act."

The appellant's position concretely stated is that subdivision (e) of Section 278 limits and qualifies subdivision (c) of the same section so as to prevent taxpayers from effectively waiving the benefit of

the statute of limitation in all cases where the right of the Government to collect taxes was barred on the date of the enactment of the Revenue Act of 1924, to-wit, June 2, 1924.

We find no language in subdivision (e) of Section 278 or in any other part of the Act of 1924 that expressly forbids taxpayers from, pursuant to the comprehensive wording of subdivision (c) voluntarily waiving the bar against the collection of validly assessed and unpaid taxes, the collection of which was barred on June 2, 1924. Subdivision (e) merely declares that Section 278 of the 1924 Act shall not authorize the assessment or the collection of such taxes. There being no clear prohibition against taxpayer's voluntary waiver or limitation for collecting taxes that have been timely assessed, it would be straining and amplifying the terms of (e) and unnecessarily restricting the broad and inclusive language of (c) to construe Section 278, as appellant contends. We should not adopt a construction that would require giving to the Statute a meaning not expressed by the language used.

Statutes of limitation barring the collection of taxes that are justly due and unpaid must receive a strict construction in favor of the Government, and limitation in such cases will not be presumed in the absence of clear Congressional action. Loewer Realty Co. v. Anderson, C. C. A. 2, 31 Fed. 2nd, 268.

Moreover, the Supreme Court has held that the right of waiver of statutes of limitation by tax-

payers does not necessarily depend upon statutory authorization. See Stange v. United States, 282 U. S., 270; Aiken v. Burnet, 282 U. S., 280; Florsheim Bros., etc. v. United States, 280 U. S., 453. There is inherent in the taxpayer what may be termed a common law right to waive the benefit of the bar of limitation.

As illustrative of the broad effect that should be given to voluntary waivers of limitation against collections of taxes the Supreme Court has pointedly said in Aiken v. Burnet, supra:

> "It is contended that the waiver of February 5, 1921, is invalid because it was executed prior to the enactment of Section 250 (d) of the Revenue Act of 1921, which was the first of the revenue acts to provide in terms for the giving of waivers. The argument is that prior to the enactment of that section the Commissioner lacked authority to accept waivers of the limitation on the period within which assessment might be made under the Acts of 1916 and 1917. This contention is not sound. The militation periods on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived. No reason appears why the Commissioner could not accept such a waiver prior to the Act of 1921. Although the Government might at that time still have brought suit even though the period for assessment had expired, it was thought desirable to follow the normal and simpler course of

> assessment and collection by distraint proceedings because of the advantages afforded. The Commissioner requested the taxpayer to execute a waiver in cases where prolonged reexamination of the return seemed necessary. If authority was needed for the acceptance of such waivers, it may be found in the general broad administrative provisions of the respective acts. Even after the Act of 1921, a so-called waiver was not a contract. The requirement in Section 250 (d) of that Act that the Commissioner sign the consent was inserted to meet exigencies of administration, and not as a grant of authority to contract waivers."

The obligation of the appellant to pay the 1917 taxes had been actually fixed and determined by a valid assessment made prior to June 2, 1924, the day the Revenue Act of 1924 went into effect, and therefore the waivers under consideration in this appeal are distinguishable from those involved in Uncasville Mfg. Co. v. Commissioner, C. C. A. 2, 56 Fed. 2nd, 893. In the latter case all of the deficiency taxes were assessed for the years in question subsequent to June 2, 1924. Upon that date the time had already expired for assessment for deficiencies for the years involved. Waivers were then given authorizing the Commissioner to assess deficiencies and acting on such waivers, he assessed them. The Circuit Court of Appeals for the Second Circuit in that case construed 278 (e) of the 1924 Revenue Act as confining 278 (c) of the same

act to instances where assessment was not barred on June 2, 1924. In the Uncasville action it thus appears that the obligation to pay, as well as the right of the Government to enforce payment of the deficiency taxes, did not exist on June 2, 1924, while here the tax debt and obligation were fully established and existent at all times since February 9, 1923. All that was accomplished by the waiver of December 7, 1925, was to revive the remedy of collection for a fixed and just debt that was due and undischarged on that date. There was no attempt by the waiver under consideration here to thereby create an indebtedness that did not exist and had not been established at the time of the waiver.

There are many strong intimations in the opinion of Mr. Justice Brandeis in Burnett v. Railway Equipment Co., 282 U. S., 295, that sustain our conclusion that the waiver of December 7, 1925, is valid and effective under Section 278 of the Revenue Act of 1924. In footnote 5 on page 300 of the official report of the Supreme Court decision in the Burnett case relative to a statement in the opinion:

> "We need not determine whether respondent is correct in assuming that section 278 (e) qualified Section 278 (c) in respect to waivers on assessment of taxes barred prior to June 2, 1924."

The following explanation appears:

> "[5]Subdivision (e) cannot be said to qualify every other subdivision in Section 278. Nothing indicates an intention to have it limit the effect

> of Section 278 (a) which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers. * * * The decision in Russell v. U. S., 278 U S., 181, involved the interpretation of Subdivision (d) which extended the period of collection without any act on the part of the taxpayer. Subdivision (c) is effective only if the taxpayer voluntarily executed a waiver."

The validity and effect of waivers given by taxpayers subsequent to June 2, 1924, and after the expiration of the period of assessment of deficiency taxes were considered by this Court in California Iron Yards Co. v. Commissioner of Internal Revenue, 47 Fed. 2nd, 514, and Judge Wilbur in the course of the opinion in that case said:

> "The petitioner seeks to review the action of the Board of Tax Appeals in affirming an order of the Commissioner of Internal Revenue fixing a deficiency tax of the petitioner for the years 1918, 1919, and 1920. The principal question in the case involves the validity and effect of a waiver of January 16, 1925. This waiver was signed more than five years after the return made by the petitioner for the year 1919, and it is contended by the petitioner that, inasmuch as this waiver was executed more than five years after return, and there-

fore after the limitation for assessment of the tax for the year 1919, it did not authorize the assessment which was made by the Commissioner on December 16, 1925. As the courts were divided upon that question (see note 1, p. 146, opinion of Supreme Court in Stange v. United States, 51 S. Ct. 145, 75 L. Ed. - -, affirming 68 Ct. Cl. 395, decided November 4, 1929), and, as the matter was then pending before the Supreme Court in that case on certiorari from the Court of Claims, it was suggested that a decision herein be postponed until the decision by the Supreme Court in that case. This decision was rendered January 5, 1931. It is there held in accordance with the contention of the Commissioner in this case that the waiver was effective, notwithstanding that it was executed after the running of the statute of limitations. It follows that a properly executed waiver was effective, notwithstanding the expiration of the period of making the assessment before the execution of the waiver."

A fortiori - - should a properly executed waiver of the bar against collection of a tax that had been timely assessed he held effective and binding.

In Hart Glass v. U. S., 48 Fed. 2nd, 443, the Court of Claims in considering the scope of waivers under 278 (c) of Revenue Acts of 1924 and 1926, said:

"By virtue of Section 278 (c) of the Revenue Acts of 1924 and 1926 * * * the waiver herein,

> although filed after the limitations had run against the assessment of taxes against the plaintiff for the year 1918, revived in the Commissioner authority to make an assessment within the period covered by the waiver."

See also the recent decision of the Court of Claims in McDonnell v. U. S., reported in Prentice-Hall Federal Tax Service on June 16, 1932, 1656, under paragraph 1308, sustaining the validity of voluntary waivers of taxpayers of the benefit of the statute of limitations where such waivers were given after the enactment of the Revenue Act of 1924 in cases where the statutory limitation had expired prior to the effective date of said Act and to the same effect see decisions of the Court of Appeals of the District of Columbia in Portage Bro. v. Burnett, 50 Fed. 2nd, 317, and Consumers Ice Co. v. Burnet, 50 Fed. 2nd, 342.

We are of the opinion that the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to revive the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection. We think this conclusion is in consonance with the decision of the Supreme Court. See Burnet v. Railway Equipment Co., 282 U. S., 298; Stange v. U. S., 282 U.

S., 274; Brown and Sons v. Burnet, 282 U. S., 283; Aiken v. U. S., 282 U. S., 277.

The appellant concedes that if the waiver of December 7, 1925, is effective the collection made by the appellee on June 30, 1927, is valid and does not constitute an overpayment which appellant can recover because the waiver of December 7, by its terms, ran to December 31, 1926, and the third waiver, that of November 29, 1926, extended the time for collection beyond June 30, 1927, to-wit, to December 31, 1927. Our conclusion that the waiver of December 7, 1925, is valid and appellants' concession relative thereto disposes of any necessity of considering Section 1106 (a) of the Revenue Act of 1926 that provided that the bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar remedy, but shall extinguish the liability as well. It should be noted, however, that this Section was by the Revenue Act of 1928 repealed as of February 26, 1926. Section 612, Chap. 852, 45 Stat. at L.

It is finally contended, however, assuming that the waiver of December 7, 1925, is valid for all purposes, that the collection made on August 28, 1928, was unauthorized and illegal. The argument in support of this contention is that because the third and last waiver had by its own terms expired before this collection was made, all right to collect was terminated on the expiration date of the waiver, notwithstanding the Revenue Act of 1926, which

extended the period for collection to six years after the date of assessment, became effective before the expiration date specified in the waiver. We think this position untenable.

Prior to December 31, 1927 (the expiry date of the last waiver), the Revenue Act of 1926, Chap. 27, 44 Stat. at L., became law. This law became an inextricable part of the waiver. Its terms and provisions must be read into and with the waiver. Section 277 (3) thereof, as far as applicable to this appeal, reads:

> "(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Section 278 (c), (d) and (e), respectively, of said Act provide:

> "(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."
>
> "(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been

made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

"(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Section 274 (a) is the Section which provides that the Commissioner must give notice to the taxpayer of a deficiency in the tax and within 60 days from such notice the taxpayer may petition the Board of Tax Appeals for a redetermination of the deficiency. This section has no application to this appeal.

When Sections 277 (3) and 278 (c), (d) and (e) of this Act are considered together and in relation to one another and then applied to the facts as found by the Court below, it is clear that the collection of August 28, 1928, was valid and legally authorized.

The assessment of February 9, 1923, was validly made within five years after the return was filed on March 30, 1928, as required by Section 277 (3) and as the three voluntary waivers effectively operated to extend the time for collection of the taxes so assessed to December 31, 1927, it is obvious from the plain and explicit terms of Sections 278 (c), (d) and (e) that were in effect during the period that was specified in the last waiver that the appellee was given the right to enforce this tax liability by collection at any time within six years after the date of the assessment or until February 9, 1929. Subdivision (d) expressly refers to an assessment timely imposed by this title or "by prior act of Congress * * * (whether before or after the enactment of this Act)." And it clearly authorizes collection of taxes made under such an assessment at any time within six years from the assessment.

The terms and provisions of the 1926 Revenue Act respecting the period of limitation upon assessment and collection of taxes are different from those of the Revenue Act of 1924. While Section 278 (d) of both Acts provide a six-year period after the date of assessment for colection of the tax, the

1924 Act in Section 278 (e) thereof provides that Section 278 shall not affect any assessment made before the enacting of the 1924 statute. No such condition is found in the Revenue Act of 1926. To the contrary, this latter statute in 278 (d) thereof expressly made the six-year period for collection applicable to assessments "Before or after the enactment" of the Act. It is clear, therefore, that Russell v. United States, 278 U. S., 181, which held that the six-year period for collection provided for in the 1924 Act did not apply where the assessment was made prior to June 2, 1924 (the effective date of the Revenue Act of 1924), because to make the six-year period applicable to such assessments would "affect" them contrary to the express terms of (e) of Section 278 of the 1924 Act, is not in point.

This Court had before it in Toy v. United States, 45 Fed. 2nd, 1, an analogous situation to the one now under discussion, except that the part of the Revenue Act of 1926 that was considered in the Toy case was Section 311, relating to estate taxes, instead of Section 278, dealing with income and profits taxes, but the limitation and waiver features of both sections are identical. In the Toy case, the estate tax return was filed August 16, 1922, and a suit for collection of this tax was brought November 14, 1927. It was held that the six-year period for collection provided by the Revenue Act of 1926 applied. Appellant seeks to distinguish this case from the one at bar because in the Toy case the

five years for the assessment and collection of the tax did not expire until after the enactment of the 1926 Revenue Act and therefore that Act could extend the limitation period by imposing the six-year period for collection, but we think that the operation of the waivers, under Section 278, whereby the right of collection was extended to a date after the enactment of the 1926 Act, as well as the terms of the 1926 Revenue Act itself, make the principle of the Toy case applicable here.

We have in an earlier part of this opinion mentioned that it has been settled by the Supreme Court in Florsheim Bros. Co. v. U. S., 280 U. S., 466, and in Aiken v. Burnet, supra, that the taxpayers' waivers of the statute of limitation in assessment and collection of taxes are not contracts that limit the power of the Government from enforcing by legislation the payment of taxes beyond the time specified in waivers, and although the appellant couched the terms of the last waiver in a manner specifically providing that "this waiver of the time for making any assessment '(collection)' as aforesaid shall remain in effect until December 31, 1927, and shall then expire," it cannot thereby disable the Government from prolonging the period for collection by Statute enacted while the waiver was in force. The 1926 Revenue Act gave a six-year period for the collection of all assessments, timely assessed and existing at the time the Act went into effect, without excepting those where waivers had been given.

In the Florsheim case, supra, the Supreme Court said:

> "The Government contends that the 'Income and Profits Tax Waivers' executed by the corporations were waivers by them of the statutory period for another year; that while these waivers were still in force and while the corporations' liability was thus still alive, the Revenue Act of 1924 and 1926 were passed, increasing the period for collection to six years after assessment; that these Acts are applicable to the cases at bar; and that, since the collections were made within six years after the assessments, they were timely made. The corporations insist that the 'Waivers were not merely waivers extending the statutory period, but were binding contracts which limited the time in which the Commissioner could assess and collect the taxes; and that no change in the law made after the date of the contracts and enlarging the time for collection can affect their rights. They urge that the 1924 and 1926 Acts did not purport to extend the periods thus limited by contract; and that, if construed as extending such periods, the provisions of these Acts are unconstitutional. They conceded that, in the absence of contract, a legislature may constitutionally lengthen or shorten the period in which a right may be enforced by legal proceedings.

We are of opinion that the contention of the Government must prevail."

The District Court was correct in holding that none of the collections in this case were barred by the Statutes of limitation. The judgment is affirmed.

[Endorsed]: Opinion. Filed Aug. 22, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6595

PACIFIC COAST STEEL COMPANY, a Corporation,

Appellant,

vs.

JOHN P. McLAUGHLIN, United States Collector of Internal Revenue for the First Collection District of California,

Appellee.

JUDGMENT.

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed August 22, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-seven (87) pages, numbered from and including 1 to and including 87, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of November, A. D. 1932.

[Seal] PAUL P. O'BRIEN, Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1932.

No. 518

Pacific Coast Steel Company, a corporation,
Petitioner,

vs.

John P. McLaughlin, United States Collector for the First Collection District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1932.

No.....

Pacific Coast Steel Company, a corporation,

Petitioner,

vs.

John P. McLaughlin, United States Collector for the First Collection District of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION.

To the Honorable, the Supreme Court of the United States:

The petitioner, the Pacific Coast Steel Company, a corporation, by its attorneys, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on August 22nd, 1932, and reported in 61 Fed. (2d) 73, affirming the decision of the District Court.

STATEMENT.

The petitioner, Pacific Coast Steel Company, brought this action in the District Court for the Northern District of California, Southern Division, for the recovery of income and excess profits taxes for the calendar year 1917, claiming that said taxes were illegally collected as deficiency taxes. The major question, the determination of which involves several issues, is whether or not the collections of this 1917 deficiency tax in the amounts of $111,953.71 on June 30, 1927, and $103,111.16 plus interest of $26,808.90 on August 27, 1928, were erroneous and illegal because of having been made after the applicable periods of limitation had barred the right of the Collector to make collection of said tax deficiency. The case was submitted to the District Court upon a stipulation of facts [R. 28]. The Honorable District Court rendered judgment in favor of the defendant [R. 46]. The Honorable United States Circuit Court of Appeals affirmed the decision of the District Court [R. 86]. A summary statement of this case follows:

On March 30, 1918, the petitioner duly filed its 1917 income and profits tax return, and duly paid the tax shown thereon. [R. 4, 28, 65.]

On December 16, 1922, the petitioner filed a waiver (set out in full in Appendix A hereto), consenting to a "determination, assessment, and collection" of its 1917 taxes "irrespective of any period of limitations." [R. 6, 11, 28, 66.] This waiver expired April 1, 1924. [R. 69.]

On February 9, 1923, an additional tax for 1917 was duly assessed against the petitioner in the amount of $257,443.30. [R. 6, 28, 66.]

On April 1, 1924 (the date of expiration of the December 6, 1922, waiver filed by petitioner), the period for collection of the aforesaid deficiency in taxes expired by virtue of the provisions of Section 250(d) of the Revenue Act of 1921. [R. 69, 70.]

On June 2, 1924, the Revenue Act of 1924 was enacted.

On December 7, 1925, the petitioner filed a waiver (set out in full in Appendix B hereto), of "the time prescribed by law for making any assessment" of 1917 taxes [R. 6, 13, 28, 66] and the waiver further provided that "this waiver for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire," unless an appeal is filed to the Board of Tax Appeals. This waiver was not signed by the Commissioner of Internal Revenue nor by any one for him. [R. 13.] The petitioner contended that this waiver was "invalid and ineffective" for the following reasons:

(1) It was not signed by the Commissioner of Internal Revenue or by any one for him and was not, therefore, an agreement or consent in writing provided for by Section 278(c) of the Revenue Act of 1924. (Sections 277 and 278 of the Revenue Act of 1924 are set out in Appendix D hereto.)

(2) It was an *assessment* waiver which was the only kind of waiver authorized by Section 278(c) of the Revenue Act of 1924, there being no need of collection waivers because of Section 278(d) which allowed six years after assessment for collection. This waiver could, therefore, not be construed as a waiver authorizing the *collection* of a barred tax.

(3) Section 278(e) restricts the other subdivisions of Section 278. Therefore, Section

278(e) would prevent any waiver filed under Section 278(c) from being effective in its application to any assessment or collection of tax which was barred at the time of the enactment of the Revenue Act of 1924.

As to petitioner's first contention the Honorable Circuit Court of Appeals apparently ruled that the Commissioner's signature was not necessary since it decided that said waiver was valid. As to petitioner's second contention, the Honorable Circuit Court of Appeals apparently ruled that a waiver of the time for assessment was valid as a waiver of the time for collection of a tax upon authority of the case of *Stange v. United States*, 282 U. S. 270.

As to petitioner's third contention the Honorable Circuit Court held that Section 278(e) does not restrict or qualify Section 278(d). Regarding this waiver and the effect thereof, the Honorable Circuit Court of Appeals concluded [R. 78]:

> "We are of the opinion that the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to revive the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection. We think this conclusion is in consonance with the decision of the Supreme Court. See Burnet v. Railway Equipment Co., 282 U. S. 298; Stange v. U. S., 282 U. S. 274; Brown and Sons v. Burnet, 282 U. S. 283; Aiken v. U. S., 282 U. S. 277."

On February 26, 1926, the Revenue Act of 1926 was enacted.

On November 29, 1926, the petitioner filed a waiver (set out in full in Appendix C hereto) of the "time prescribed by law for making any assessment" of 1917 taxes. [R. 6, 29, 67.] The waiver further provided that "this waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire."

On June 30, 1927, a part payment of $111,953.71 was made against said 1917 deficiency [R. 7, 28, 67] (which deficiency had theretofore by valid credits been reduced to $215,064.84), by the application by the Commissioner as a credit against said deficiency, of an amount of $111,953.71 representing overpayments by this petitioner of its income and profits taxes for the years 1918 and 1919.

Petitioner contends that on February 26, 1926, its liability for the payment of the 1917 tax deficiency was extinguished by Section 1106 of the Revenue Act of 1926 (Appendix D hereto) and that, therefore, this collection on June 30, 1927, of $111,953.71 was illegal. The Honorable Circuit Court of Appeals held that since the assessment waiver of December 7, 1925, was effective as extending the time for collection of the 1917 tax to December 31, 1926, and since, therefore, the collection was not barred on February 26, 1926, and since the assessment waiver of November 29, 1926, was given before the expiration of the December 7, 1925, waiver and was likewise valid as a collection waiver, the collection was within the period as extended by the waivers and, therefore, valid. [R. 79.]

December 31, 1927, was the expiration date of the waiver period specified in the November 29, 1926, waiver.

On August 27, 1928, the balance of the 1917 deficiency of $103,111.16 plus interest of $26,808.90 was collected by the respondent. [R. 8, 28, 67.]

Petitioner contends that this collection was invalid as being made after the liability for said tax had been extinguished by Section 1106 of the Revenue Act of 1926, and *further*, that even if all the assessment waivers were valid and effective as extending the time for collection of the 1917 tax deficiency, this collection on August 27, 1928, was invalid because made after the date of expiration of the November 26, 1926, waiver. The Honorable Circuit Court of Appeals ruled that the provisions of Section 278 (d) of the Revenue Act were to be so construed to allow six years from assessment for collection, and that those provisions "became an inextricable part of the waiver" and "its terms and provisions must be read into and with the waiver" of November 29, 1926, and that, therefore, the period for collection of the 1917 deficiency did not expire until February 9, 1929, six years after the date of assessment. [R. 80.]

Specifications of Errors.

The Circuit Court of Appeals erred:

1. In holding that the waiver of December 7, 1925, though a waiver of *assessment* only, was valid and effective as a waiver of the period for *collection*.

2. In holding that the waiver of December 7, 1925, was valid though not signed by the Commissioner, and that Section 278(c) does not require the written signature of the Commissioner, either by himself or by some one else for him.

3. In holding that Section 278(e) of the Revenue Act of 1924 did not qualify Section 278(c) of said Act in respect to waivers on collection of taxes barred prior to June 2, 1924, and in holding therefore that the waiver of December 7, 1925, "was effective and that it operated to revive the right of the government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection." [R. 78.]

4. In failing to hold that the December 7, 1925, waiver was invalid and that the liability for the barred tax was extinguished by Section 1106 of the Revenue Act of 1926.

5. In holding that the waiver of November 29, 1926, though a waiver of *assessment* only, was valid and effective as a waiver of the period for *collection*.

6. In failing to hold that the waiver of November 29, 1926, could not revive an extinguished *liability* for taxes.

7. In holding that the waiver of November 29, 1926, which was signed by the Commissioner and by its terms provided "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire," was valid and effective to extend the period for collection of said 1917 tax deficiency, to February 9, 1929, six years after the date of assessment of said tax.

8. In holding that the amounts paid on June 30, 1927, and August 27, 1928, or either of them, did not constitute overpayments and were not refundable to petitioner.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. (a) This decision of the Honorable Circuit Court of Appeals in this proceeding, holding that Section 278(e) of the Revenue Act of 1924 does not restrict or qualify Section 278(c) and holding that a waiver given after June 2, 1924, and before February 26, 1926, in a case where the statute of limitations had expired prior to June 2, 1924, was a valid waiver, is in direct conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Uncasville Mfg. Co. v. Commissioner*, 55 Fed. (2d) 893 (*certiorari* denied April 18, 1932), and is also in conflict with the decision of this Honorable Court in the case of *Benjamin Russell v. United States*, 278 U. S. 181.

(b) This Honorable Court on October 24, 1932, granted *certiorari* in the case of *McDonnell v. United States* (Court of Claims), 59 Fed. (2d) 290, which case was relied upon by the Circuit Court of Appeals in its decision in this proceeding, and was also expressly in conflict with the Uncasville Mfg. Co. (*supra*) decision in the same respect as stated in the paragraph hereof immediately preceding.

(c) The decision of the Circuit Court of Appeals in this proceeding holding that under Section 278 of the Revenue Acts of 1924 and 1926, waivers given after the statutory period of limitations had expired, were valid, is in direct conflict with the decision of the District Court of Appeal in the case of *Joy Floral Co. v. Commissioner*, 29 Fed. (2d)) 865.

2. In the case of *Stange v. United States*, 282 U. S. 270, and *Aiken v. Burnet*, 282 U. S. 277, this Honorable

Court decided that it was not necessary that the Commissioner *personally* sign all waivers before those waivers became valid and effective. In the Aiken case the Court stated, "The requirement in Section 250(d) of that Act" (Revenue Act of 1921—same *requirement* in Section 278(c) Revenue Act of 1924) "that the Commissioner sign the consent was inserted to meet exigencies of administration, * * *." The Circuit Court of Appeals (apparently following its decision in the case of *Commissioner v. Hind*, 52 Fed. (2d) 1075), construes this Court's decision in the Stange and Aiken cases as meaning that waivers are valid even *without* the Commissioner's signature, and therefore held in the instant proceeding that the assessment waiver filed by the Pacific Coast Steel Co., on December 7, 1925, was valid even though not signed by the Commissioner or by any one else for him.

In the case of *Corn Products Refining Company v. Commissioner*, 22 B. T. A. 605 (not appealed), the Board of Tax Appeals in a well reasoned opinion construes this Court's decision in the Stange and Aiken cases as meaning that although the statute *requires the Commissioner's signature* on the consent or waiver, the statute did not require that the Commissioner *personally* sign the waivers. The Board held that the requirement of the statute must be complied with, and that unless the Commissioner's signature, made either by himself or by someone for him, appears on the consent or waiver, the waiver is invalid.

This is a very important question and undoubtedly affects the validity of a great many waivers. Since there is involved a conflict in interpreting decisions of this Court, considerable confusion and litigation would be pre-

vented by a definite expression by this Court as to this question which is involved as an issue in this proceeding.

3. In the case of *Stange v. United States*, 282 U. S. 270, this Court decided that under the provisions of Section 250(d) of the Revenue Act of 1921 which provided for the waiver by consent in writing by both the Commissioner and the taxpayer, of the statutory period of limitation for "determination, assessment and collection of the tax," an assessment waiver purporting only to extend the time for assessment of income taxes, is operative to extend the time for collection.

In this proceeding the Circuit Court of Appeals apparently followed the Stange decision since it held that the assessment waivers filed by the Pacific Coast Steel Company were valid collection waivers.

Section 278(c) of the Revenue Act of 1924 and Section 278(c) of the Revenue Act of 1926 differ from Section 250(d) of the Revenue Act of 1921 in that they authorize waivers of the statutory time *for assessment only*. The reason appears to be—Section 278(c) of both Acts (1924 and 1926) indicate the intent of the legislature that tax levies for prior years should not be affected by those Revenue Acts, and Section 278(d) provides for the collection of taxes within six years after assessment of taxes assessed after June 2, 1924, the date of enactment of the Revenue Act of 1924.

Since, therefore, the application by the Circuit Court of Appeals of the Stange decision to the instant proceeding

to hold that an assessment waiver is a valid collection waiver, appears to be in conflict with the legislative intent as to the purpose of Section 278 of the Revenue Acts of 1924 and 1926, and decides an important question of federal law, we respectfully submit that this question (whether under the Revenue Acts of 1924 and 1926 a waiver of time for assessment only is a valid waiver of time for collection as well as assessment) which is an issue in this proceeding, should be settled by this Court.

4. The Circuit Court of Appeals held that the assessment waiver filed by the Pacific Coast Steel Company, dated November 29, 1926, was valid and effective to extend the time for collection of the otherwise barred tax assessment, to February 9, 1929, six years after assessment of the tax, even though the waiver specifically provided that it "shall remain in effect until December 31, 1927, and shall then expire." We respectfully submit that the decision of the Circuit Court of Appeals holding that the terms of the waiver should be disregarded and the effective period of the waiver extended to February 9, 1929, is probably untenable (*Rahilly v. O'Loughlin*, 1 Fed. (2d) 1; *Tridell v. Munhall*, 124 Fed. 802), and that this decision holding that the six-year period for collection after assessment, provision of the Revenue Acts (Sec. 278(d) Revenue Act of 1924 and 1926) became an inextricable part of the waiver regardless of the provisions of the waiver, decides a very important question of federal law which has not been but should be settled by this Court.

We also respectfully submit that the Court's decision regarding this question is in conflict with the decision of the Court of Claims in the case of *Roy & Titcomb, Inc. v. United States*, 39 Fed. (2d) 753.

WHEREFORE, it is respectfully submitted that this petition should be granted.

Dated at Los Angeles, California, this 15 day of November, 1932.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1932.

No.....

Pacific Coast Steel Company, a corporation,

Petitioner,

vs.

John P. McLaughlin, United States Collector for the First Collection District of California,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION BELOW.

No written opinion was rendered by the United States District Court for the Northern District of California, Southern Division in which Court this suit was initiated. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit [R. 65], affirming the judgment of the District Court [R. 86], is reported in 61 Fed. (2d) 73.

JURISDICTION.

The judgment sought to be reviewed was entered August 22, 1932. [R. 87.] The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Under this heading we respectfully submit in question form, a restatement of the specification of errors hereinbefore set forth in the Petition for Certiorari.

I-1. Where an assessment of a 1917 tax, based on a return filed March 30, 1918, was made on February 9, 1923, prior to the enactment of the Revenue Act of 1924 (June 2, 1924), and where the collection of the tax so assessed was barred before the enactment of the Revenue Act of 1924 by reason of the expiration of the statutory period of limitations on collections and where a waiver purporting to extend the period of limitations *on assessment alone* to December 31, 1926, was given on December 7, 1925, and was not signed by the Commissioner, or any one for him,—

(a) Is that waiver valid even though not signed by the Commissioner or any one for him? (Sec. 278(c), Revenue Act of 1924);

(b) Is that assessment waiver a good collection waiver? (Section 278(c), Revenue Act of 1924);

(c) Is that waiver valid and effective to extend the period of limitations for the collection of the tax assessed? (Sections 277, 278(c), (d) and (e), Revenue Act of 1924, Revenue Act of 1926.) (This question affects the entire case.)

2. If question 1(c) is answered in the negative, is the liability for the assessed tax extinguished by Section 1106 of the Revenue Act of 1926? If so, is the *liability* for said tax and the right to collect, revived by the *assessment* waiver of November 29, 1926, which purported to extend the period of limitations *on assessment only* to December 31, 1927? (This question affects the validity of the collection made on June 30, 1927.)

3. If question 1 is answered in the negative, and if Section 1106 of the Revenue Act extinguished the liability for said tax, is that liability revived by Section 612 of the Revenue Act of 1928 which repealed Section 1106 of the Revenue Act of 1926 as of February 26, 1926? (This question affects the entire case.)

4. If question 3 is answered in the affirmative, is the assessment waiver of November 29, 1926 effective to extend the period for collection? (Section 278(d) and (e), Revenue Act of 1926.) (This question affects the validity of the collection on June 30, 1927.)

II-5. If both the December 7, 1925 and the November 29, 1926 waivers are valid and effective to extend the statutory period of limitations for collection of the 1917 deficiency tax, is the period of extension the period prescribed in the waiver, or the six-year period after assessment? (Section 278(d), Revenue Act of 1926.) (This question affects the validity of the collection made on August 27, 1928.)

The United States Circuit Court of Appeals decided question I-1 in the affirmative [R. 78] and as to question II-5 decided that the waiver of November 29, 1926 was effective to extend the period for collection six years from the date of assessment. [R. 80.]

STATUTES INVOLVED.

See Appendix D hereto.

STATEMENT.

A full statement of the case has been given under the heading "Statement" in the Petition for Certiorari, and in the interest of brevity is not repeated here.

ARGUMENT.

The Collection of the February 9, 1923, Assessment Was Barred by the Statute of Limitations on April 1, 1924.

This proposition was not questioned by the Circuit Court of Appeals.

The petitioner's 1917 return was filed on March 30, 1918. Under Section 250 (d) of the Revenue Act of 1921 the statute of limitations for determination, assessment and collection of the 1917 taxes was five years from the time the return was filed. Also under the same section, that period could be extended by an agreement in writing between the Commissioner and the taxpayer. The petitioner on December 18, 1922, filed an unlimited waiver which extended the time for determination, assessment and collection of the 1917 taxes (which would have expired March 30, 1923—five years after the return was filed) until April 1, 1924 (Commissioner's Mimeo. 3085 I. R. Cum. Bull. II-1, p. 174; *Stange v. United States*, 51 Sup. Ct. 145, 282 U. S. 270).

On February 9, 1923, within the statutory period of limitations the Commissioner assessed an additional 1917 tax against the petitioner in the amount of $257,443.30.

During the same month the Commissioner collected $3,833.41 [R. 22] of this tax by applying certain overpayments as a credit. No other amount was collected until 1927 and 1928.

Under Section 250 (d) of the Revenue Act of 1921, the collection of the balance of this assessment was barred after April 1, 1924. The right to collect such tax was not revived by the Revenue Act of 1924 (*Bowers v. New York and Albany Lighterage Company*, 273 U. S. 346; *Benjamin Russell v. United States*, 278 U. S. 181; *Daube v. United States*, 59 Fed. (2d) 842; *Wickwire v. Commissioner*, 10 B. T. A. 102; *Chicago Insulated Wire and Manufacturing Company v. Commissioner*, 10 B. T. A. 1195).

The Assessment Waiver of December 7, 1925, Did Not and Could Not Affect Assessments Made Prior to June 2, 1924, Nor Could It Revive the Right to Collect Where Such Right Had Expired by Operation of the Statute of Limitations Prior to June 2, 1924. (Sec. 278(e), Revenue Act of 1924.)

Conflict in Decisions—THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF UNCASVILLE MFG. CO. *v.* COMMISSIONER, 55 FED. (2D) 893 (CERTIORARI DENIED APRIL 18, 1932), CONSTRUED SECTION 278 (E) OF THE REVENUE ACT OF 1924 AS RESTRICTING SECTION 278 (C) OF THE SAME ACT AND CONFINING SAID SECTION 278 (C) TO INSTANCES WHERE ASSESSMENT (AND COLLECTION IF COLLECTION WAIVERS ARE AUTHORIZED BY SECTION 278 (C)) WAS NOT BARRED BY THE STATUTE OF LIMITATIONS ON JUNE 2, 1924. THE COURT OF CLAIMS IN THE CASE OF MCDONNELL V. U. S., 59 FED.

(2D) 290 (CERTIORARI GRANTED OCT. 24, 1932) EXPRESSLY DISAGREED WITH THE UNCASVILLE CASE AND HELD DIRECTLY TO THE CONTRARY, THAT IS, THAT SECTION 278 (E) DID NOT QUALIFY OR RESTRICT SECTION 278 (C) OR CONFINE IT TO INSTANCES WHERE THE STATUTE HAD NOT BARRED ASSESSMENT OR COLLECTION ON JUNE 2, 1924. IN THIS PROCEEDING, THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CITED WITH APPROVAL THE MCDONNELL CASE [R. 78] AND HELD WITH THE MCDONNELL CASE AND IN DIRECT CONFLICT WITH THE UNCASVILLE CASE BY DECIDING THAT THE DECEMBER 7, 1925, ASSESSMENT WAIVER GIVEN BY THE PACIFIC COAST STEEL CO. WAS EFFECTIVE AND REVIVED THE RIGHT OF THE GOVERNMENT TO COLLECT THE TAXES ASSESSED ON FEBRUARY 9, 1923, ALTHOUGH AT THE TIME THIS WAIVER WAS GIVEN AND PRIOR TO THE DATE THE REVENUE ACT OF 1924 BECAME EFFECTIVE, THE STATUTE OF LIMITATION HAD RUN AGAINST THE REMEDY OF COLLECTION. THIS DECISION APPEARS ALSO TO BE IN CONFLICT WITH THIS COURT'S DECISION IN THE CASE OF BENJ. RUSSELL V. U. S., 278 U. S. 181.

On June 2, 1924, the date of enactment of the Revenue Act of 1924, the collection of the 1917 deficiency tax was barred by operation of the statute of limitations. The right to collect this tax was not revived by the Revenue Act of 1924 unless the waiver filed by the petitioner under date of December 7, 1925, effected such revival. Section 277 (a) (3) of the Revenue Act of 1924 re-enacted the provisions of Section 250 (d) of the Revenue Act of 1921 insofar as it provided that the assessment and collection of any 1917 taxes should be made within five years after

the return was filed. Certain exceptions were specified, however, and these exceptions are set forth in Sections 278 (c), (d) and (e) of the Revenue Act of 1924. Section 278 (c) provides that:

> "Where both the Commissioner and the taxpayer have consented in writing to *the assessment of the tax* after the time prescribed in section 277 for *its assessment*, the tax *may be assessed* at any time prior to the expiration of the period agreed upon." (Italics ours.)

Section 278 (d) provides:

> "Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected * * * within six years after the assessment of the tax."

Section 278 (e) definitely limits the application of Section 278. It provides as follows:

> "This section *shall not* (1) *authorize* the assessment of a tax or the collection thereof by distraint or by a proceeding in court *if at the time of the enactment of this act* such assessment, distraint, or *proceeding was barred* by the period of limitations then in existence, *or* (2) *affect any assessment made*, or distraint or proceeding in court begun, *before the enactment of this act*."

If Section 278 (e) restricts or qualifies Section 278 (c), the waiver filed by the petitioner under date of December 7, 1925, would be invalid since if effective it would violate the specific provisions of Section 278 (e) in that it would authorize a collection of a tax barred by the period of limitations before the enactment of the 1924 Act and

would also affect the assessment made in February, 1923, before the enactment of the 1924 Act.

In the case of *Benjamin Russell v. United States, supra*, the 1918 tax was assessed on March 30, 1924. The Government contended that under Section 278 (d) of the Revenue Act of 1924 it had six years from assessment or until March, 1930, for collection. The Court in concluding that the six-year period for collection did not apply to assessments made before June 2, 1924, made the following statement:

> "Manifestly, but for Section 278 petitioners would be free from liability under the five-year limitation in the Act of 1918, continued by the Act of 1921. If Section 278 refers only to assessments made after June 2, 1924, petitioners are not liable. * * * The rather obvious design, we think," (of Section 278 (e) of the Revenue Act of 1924) "was to deprive Section 278 of any possible application to cases where assessment had been made prior to June 2, 1924."

It is true that the Court had before it only the question of whether Section 278 (e) restricted Section 278 (d). However, as indicated in the quotation immediately preceding, the Court did not confine its decision to those limitations but rather decided that Section 278 (e) deprived all provisions of Section 278 of any possible application to cases where assessment had been made prior to June 2, 1924. (There are some intimations to the contrary in the case of *Burnet v. Chicago Railway Company*, 282 U. S. 295, but see *Uncasville Mfg. Co. v. Commissioner, infra.*)

In the Russell case, the Court pointed out that under the Revenue Act of 1924, a radical distinction was created between assessments made prior to June 2, 1924, and assessments made after June 2, 1924. That this was a real distinction is proven by the legislative history of Section 278 of the Revenue Act of 1924 which shows the intention of the legislature that assessments and proceedings begun prior to the enactment of the Revenue Act of 1924 should stand on their own footing and should not be affected by any provisions of the 1924 Act (*United States v. Whyel*, 28 Fed. (2d) 30; certiorari dismissed, 49 Sup. Ct.).

The United States Circuit Court of Appeals for the Second Circuit in the case of *Uncasville Manufacturing Company v. Commissioner*, 55 Fed. (2d) 893, (*certiorari* denied April 18, 1932), held that in spite of some intimations in *Burnet v. Chicago Railway Company, supra*, to the contrary Section 278(e) confines Section 278(c) to cases where the assessment was not barred on June 2, 1924. The Court of Claims in the case of *McDonnell v. United States*, 59 Fed. (2d), 290 (*certiorari* granted October 24, 1932), refused to agree with the decision of the Circuit Court of Appeals in the Uncasville case and held directly contrary by ruling that section 278(e) of the Revenue Act of 1924 did not limit the provisions of section 278 (c) of the Revenue Act of 1924. In the instant proceeding the Circuit Court of Appeals for the Ninth Circuit agreed with the Court of Claims, and by holding that Section 278(e) did not restrict Section 278(c), rendered a decision directly in conflict with the decision of the Circuit Court of Appeals in the Uncasville Manufacturing Company case. (See also *Joy Floral Co. v. Commissioner*, 29 Fed. (2d) 865.)

The December 7, 1925, Waiver Is Invalid, Since it Was Not Signed by the Commissioner of Internal Revenue or by Anyone for Him.

Conflict in Decisions—THIS COURT IN THE CASES OF STANGE V. U. S., 282 U. S. 270; AIKEN V. BURNET, 282 U. S. 279, AND BURNET V. CHICAGO RY. EQUIPMENT CO., 282 U. S. 295, HAD BEFORE IT THE QUESTION WHETHER THE REQUIREMENT OF THE REVENUE ACTS THAT WAIVERS BE SIGNED BY BOTH THE TAXPAYER AND THE COMMISSIONER OF INTERNAL REVENUE, MADE IT NECESSARY THAT THE COMMISSIONER PERSONALLY SIGN ALL WAIVERS OR WHETHER THE SIGNATURE OF THE COMMISSIONER PLACED ON THE WAIVER BY SOMEONE ELSE FOR HIM WAS SUFFICIENT COMPLIANCE WITH THE STATUTE. THIS COURT HELD THAT IT WAS NOT NECESSARY THAT THE COMMISSIONER PERSONALLY SIGN THE WAIVERS. THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF COMMISSIONER V. HIND, 52 FED. (2D) 1075 (WHICH WAS APPARENTLY ADHERED TO WITHOUT CITATION IN THE DECISION IN THE INSTANT CASE) AND IN THIS PROCEEDING, IN CONSTRUING THE STANGE DECISION, HELD THAT THE COMMISSIONER'S SIGNATURE NEED NOT APPEAR AT ALL UPON THE WAIVERS AND THAT THE LACK OF THE COMMISSIONER'S SIGNATURE ON THE WAIVER DID NOT AFFECT THE VALIDITY OF THE WAIVER. THE BOARD OF TAX APPEALS IN THE CASE OF CORN PRODUCTS REFINING CO. V. COMMISSIONER, 22 B. T. A. 605, IN CONSTRUING THE STANGE DECISION HELD, THAT THE STATUTE REQUIRED THE COMMISSIONER'S SIGNATURE UPON THE WAIVER, AND ALTHO THE SIGNATURE MIGHT BE PLACED ON THE WAIVER BY ANYONE ELSE FOR HIM,

WHICH WOULD BE SUFFICIENT COMPLIANCE WITH THE STATUTE, THE STANGE DECISION DID NOT INTEND TO NULLIFY THE REQUIREMENT OF THE STATUTE, AND DID NOT RULE THAT THE WAIVER WOULD BE VALID WHERE IT WAS NOT SIGNED BY THE COMMISSIONER OR ANYONE ELSE FOR HIM.

Before following the effect of the invalidity of the December 7, 1925 waiver, we wish to submit argument in support of our contentions that the said waiver is invalid as a collection waiver, first, because it is not signed by the Commissioner or any one for him, and, second, because it is a waiver of the time for assessment only, and is not a waiver of the limitation for making collections.

Section 278(c) of the Revenue Act of 1924 permits an assessment to be made at any time prior to the expiration of a period *agreed upon in writing by both the Commissioner and the taxpayer.* The waiver of December 7, 1925, (Appendix B) is signed only by the taxpayer. Although in the cases of *Stange v. United States, supra,* and *Aiken v. Burnet,* 282 U. S. 279, and *Burnet v. Chicago Railway Equipment Company,* 282 U. S. 295, this Honorable Court held that the provision requiring the Commissioner's signature was inserted for purely administrative purposes, and held that the Commissioner's signature might be placed upon the waiver by someone else without affecting the validity of the waiver, this court did not hold that the signature was not required. To hold that the signature was not required would completely nullify the specific provision that a consent or waiver must be in writing by both the Commissioner and the taxpayer. We respectfully submit that the waiver

in order to be valid must bear the signature of the Commissioner of Internal Revenue, made either by himself personally or by someone for him, and where such signature is not placed upon the waiver, the waiver is invalid. (*Corn Products Refining Company v. Commissioner*, 22 B. T. A. 605; *contra, Commissioner v. George Hind*, 52 Fed. (2d) 1075; see also *United States Refractories Company v. Commissioner*, 23 B. T. A. 872, 877.)

Waiver of December 7, 1925, Is an Assessment Waiver and Does Not Extend the Period of Limitations for Collection of the Tax Assessed on February 9, 1923.*

Conflict in Decisions—THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HOLDING AN ASSESSMENT WAIVER UNDER THE REVENUE ACTS OF 1924 AND 1926 VALID AS A COLLECTION WAIVER, APPEARS TO BE IN CONFLICT WITH THE UNDERLYING PRINCIPLE OF DECISIONS OF THIS COURT IN THE NEW YORK & ALBANY LIGHTERAGE CO. CASE (273 U. S. 346) AND THE BENJAMIN RUSSELL CASE (278 U. S. 181) AND STANGE CASE (282 U. S. 270, 277) WHICH HELD THAT THE DISTINCTIONS BETWEEN ASSESSMENT AND COLLECTION WERE NOT TO BE DISREGARDED.

We have hereinbefore made reference to the cases of *Russell v. United States* and *United States v. Whyel* which recognize the intent of the Legislature that the

* That the waiver of December 7, 1925 (Appendix B) is a strict assessment waiver cannot be doubted. Its terms specifically confine it to an extension of the time for assessment and its reference to an appeal to the Board of Tax Appeals further indicates its restriction to assessment only, since an appeal to the Board of Tax Appeals can be taken only from a final determination before assessment or from a jeopardy assessment. The jeopardy assessment provisions are not involved in the instant proceedings.

Revenue Act of 1924 should in no way affect assessments or proceedings begun prior to June 2, 1924, the date of the enactment of the 1924 Act. Section 278(c) of the Revenue Act of 1924 provided for waivers extending the statutory period of limitations on assessments only. It was not necessary that provision be made for collection waivers, since Section 278(d) provided that the period for collection for taxes assessed after June 2, 1924, shall be six years after the date of assessment. The legislative history of Section 278 of the Revenue Act of 1924 must have put the Government on notice that any taxes assessed prior to June 2, 1924, and still collectible on that date must be collected before the expiration of the statutory period of limitation provided for in the previous revenue acts. The Government must also have been put on notice that any assessments barred from collection before June 2, 1924, were to become closed issues. If assessed taxes were still collectible after June 2, 1924, the Government could have enforced their collection. If, after June 2, 1924, the taxes were still assessable the Government could have assessed those taxes within the period of limitation provided therefor and would then have had an additional six years within which to make collection. For these reasons, we respectfully submit that Section 278(c) was enacted specifically for the purposes of changing the provisions of Section 250(d) of the Revenue Act of 1921, which provided for waivers to extend the period for "determination, assessment and collection of taxes" in order to make provision for the authorization of assessment waivers only.

The giving of the December 7, 1925, waiver as an assessment waiver only might not have been a futile act,

since the Commissioner has the power within the period of limitations to make such reexaminations, redeterminations and reassessments as may be necessary to collect the entire deficiency. (*Commissioner of Internal Revenue v. Wilson*, 60 Fed. (2d) 501, 503.) An original tax might be barred from collection and yet a deficiency proposed under a waiver might be collectible by reason of the waiver. (*Northern Anthracite Coal Company v. Commissioner*, 21 B. T. A. 1116.) In the instant proceeding the Commissioner made no further assessments after February, 1923. The cases of *Stange v. United States, supra*, and *Aiken v. Burnet, supra*, held that assessment waivers might be effective as valid collection waivers, but these cases involve Section 250(d) of the Revenue Act of 1921, which authorized collection waivers and provided one and the same period of limitation for "determination, assessment and collection" of taxes. We respectfully submit that these cases do not control the construction of waivers under Section 278(c) of the Revenue Act of 1924, since that section, as hereinbefore pointed out, authorized waivers for assessment only.

Petitioner's Liability for the February 9, 1923, Assessment Was Extinguished by Section 1106 of the Revenue Act of 1926 and That Liability Could Not Be Revived by the November 29, 1926, Waiver or by Section 612 of the Revenue Act of 1928.

Since the Circuit Court of Appeals decided that the waiver of December 7, 1925, was valid, it did not consider this question, as to the effect of Section 1106 of the Revenue Act of 1926.

If the waiver of December 7, 1925, is void or ineffective because of any of the reasons hereinbefore discussed, Section 1106(a) of the Revenue Act of 1926 (enacted February 26, 1926) would extinguish the petitioner's lia-

bility for the 1917 taxes assessed in February, 1923. The latter assessment waiver of November 29, 1926, filed by the petitioner, could not revive a liability which had been extinguished previously thereto by Section 1106. (*United States v. John Barth*, 27 Fed. (2d) 782, reversed by Supreme Court on other grounds, 279 U. S. 370; *Pepsin Syrup Company v. Schwaner*, 35 Fed. (2d) 197; *George Hind v. Commissioner*, 18 B. T. A. 96; *Peerless Woolen Mills v. Commissioner*, 13 B. T. A. 1119.) Neither could that liability, having once been extinguished, be revived by the provisions of Section 612 of the Revenue Act of 1928. (*Steiner Manufacturing Company v. Commissioner*, 18 B. T. A. 740; *United States Refractories Company v. Commissioner*, 23 B. T. A. 872, 877; *White Oak Transportation Company v. Commissioner*, 24 B. T. A. 307, 317; *Wolf Company v. Commissioner*, Memo. Op. *Prentice Hall, 1932 Fed. Tax Service*, para. 1017.)

Payments Made After the Statutory Period for Collection Had Expired Constitute Overpayments Which Are Refundable.

Section 607 of the Revenue Act of 1928 provides:

> "Any tax (or any interest, penalty, additional amount or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer, if claim therefor is filed within the period of limitation for filing such claim."

Under the above provision the payments made by this petitioner of $111,953.71 on June 30, 1927, and $129,910.06 on August 27, 1928, which were made after the expiration of the period of limitation properly applicable thereto, are overpayments of which petitioner is entitled to refund.

Section 278 of the Revenue Act of 1926 Does Not Authorize the Collection of a Tax Barred on February 26, 1926, the Date of Enactment of the Revenue Act of 1926.

The Circuit Court of Appeals held against the petitioner on this question.

Under Section 278 (e) of the Revenue Act of 1924, if the assessment was made prior to June 2, 1924, nothing in the Revenue Act of 1924 could affect the status of that assessment or lengthen the statutory period for its collection.

The Revenue Act of 1926 changed this situation by omitting the provisions of Section 278 (e) (2) of the Revenue Act of 1924, by inserting in Section 278(d) the provision that it should apply to assessments made before as well as after the enactment of the Revenue Act of 1926, by recognizing in Section 278(d) that the taxpayer and the Commissioner may waive the period of limitation for *collection* by adding the provision that the Commissioner may institute proceedings to collect a tax if begun "(2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer," and by providing that the prohibition in Section 278(e) regarding the application of Section 278 to assessments or collections barred at the time of enactment of the 1926 Act, should not apply where, before the enactment of the 1926 Act, the Commissioner and the taxpayer agreed in writing to the assessment or collection of the tax.

Even under the Revenue Act of 1926, Section 278(e) restricts Section 278 and prohibits the extension of the

statute of limitations (by adding six years after assessment for collection) in all cases where the statutory period for collection had expired prior to the enactment of the Revenue Act of 1926. (General Counsel Memorandum 1546, I. R. Cum. Bul. VI-1, p. 109; *E. J. Lorie v. Commissioner,* 21 B. T. A. 612; *White v. Hopkins,* 51 Fed. (2d) 159.)

Regarding the effect of Section 278(e) of the Revenue Act of 1926 the Board of Tax Appeals in the case of *Jacobs Bros. v. Commissioner,* 19 B. T. A. 315, stated:

> "Except for the collection waiver filed as aforesaid, it seems that there could be no question but that the collection was barred. The real question here is the effect of the collection waiver which was filed on December 3, 1927.
>
> "At the time of the enactment of the Revenue Act of 1926 the collection of the tax was already barred by the statutory period of limitation properly applicable thereto and the Commissioner and the taxpayer did not agree in writing prior to the enactment of the Revenue Act of 1926 to any extension of time for the collection of the tax after the expiration of the statutory period. Subdivision (e) of section 278 is a limitation upon all the other provisions of section 278 of the Revenue Act of 1926, and under that subdivision any consent or agreement by the Commissioner and the taxpayer with respect to the assessment or collection of the tax must be made prior to the enactment of that Act in order to have effect, provided at the time of the enactment of the Act the assessment or collection was barred."

The Assessment Waiver of December 7, 1925, Is Not an Agreement in Writing Between the Taxpayer and the Commissioner Within the Meaning of Section 278(e)(1) of the Revenue Act of 1926 or Section 506 of the Revenue Act of 1928.

Conflict in Decisions—THIS DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HOLDING THAT THE WAIVER OF DECEMBER 7, 1925, WAS VALID EVEN THOUGH GIVEN AFTER THE STATUTORY PERIOD OF LIMITATION HAD EXPIRED, APPEARS TO BE IN CONFLICT WITH THE DECISION OF THE DISTRICT COURT OF APPEALS IN THE JOY FLORAL COMPANY CASE, 29 FED. (2D) 865, WHICH HELD THAT SECTION 278 OF THE REVENUE ACT OF 1926 DID NOT RECOGNIZE AS VALID ANY WAIVERS GIVEN AFTER THE STATUTORY PERIOD OF LIMITATIONS HAD EXPIRED.

In discussing the applicability of Section 278 of the Revenue Act of 1926, we had for the time being ignored the existence of the waiver executed by the taxpayer on December 7, 1925. As we have hereinbefore pointed out, Section 278(e)(1) prevented the authorization by Section 278 of the collection of any tax if, at the time of the enactment of the Act, such collection was barred by the statutory period of limitation properly applicable thereto, *unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto.*

The question now arises whether the waiver of December 7, 1925, comes within the "unless" provision of Section 278(e)(1) so as to prevent the application of the restrictive provision of Section 278(e). We have hereinbefore pointed out that Section 278(e) of the Revenue

Act of 1924 prohibited Section 278 of that Act from affecting any tax assessed prior to June 2, 1924, or from authorizing the collection of any tax, the collection of which was barred prior to June 2, 1924. By reason of that prohibition, the waiver of December 7, 1925, executed after the enactment of the Revenue Act of 1924 and after the statutory period for collection of the assessment had expired, not only could not authorize the collection of that assessment but was prohibited from being effective for that purpose. By virtue of that prohibition the waiver was void as a consent to a collection of a tax assessed and barred before June 2, 1924. Its legality could not be established at a later date by the enactment of the Revenue Act of 1926. It could not, therefore, be construed as being a consent such as was intended by the terms of Section 278(e)(1) of the Revenue Act of 1926.

In this connection also, we respectfully submit that Section 506 of the Revenue Act of 1928 (Appendix D hereto), is declaratory of the intention of the legislature as to the meaning of Section 278 of the Revenue Act of 1926 and that therefore Section 278 of the Revenue Act of 1926 does not give effect to a waiver given after the statutory period of limitations had expired. (*Joy Floral Co. v. Commissioner*, 29 Fed. (2d) 865.)

Again, this waiver does not comply with the requirements of Section 278(e) (1) of the Revenue Act of 1926, since it is not an agreement in writing between the taxpayer and the Commissioner. The waiver is not signed by the Commissioner or by any one else for him. A printed instrument bearing the signature of but one party cannot be said to be an agreement in writing between two

parties. The waiver form (Appendix B) provides spaces for the signature of both the taxpayer and the Commissioner, yet the Commissioner has failed to sign.

Again, this waiver is not an agreement in writing between the Commissioner and the taxpayer consenting to an extension of time for the *collection* of a tax. It is difficult to understand how this waiver can be interpreted as anything other than a printed agreement between the Commissioner and the taxpayer consenting to a definite extension of time for assessment and *assessment only*.

Section 278(d) of the Revenue Act of 1926 provides that a proceeding for collection may be instituted "(2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer." Section 278(c) provides "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. The statute recognizes the distinction between assessment and collection and provides for waivers or consents for each. The waiver of December 7, 1925, was an assessment waiver contemplated by Section 278(c) and was not a collection waiver contemplated by Section 278(d)(2) and Section 278(e)(1).

This case must therefore be considered as though no agreement or valid waiver was filed and in that event, the bar of the statute of limitations against the collection of the February, 1923, assessment was not disturbed by the Revenue Act of 1926 and the liability for that assessment was extinguished by Section 1106 of said Act.

If the Assessment Waivers of December 7, 1925, and November 29, 1926, Are Valid and Effective to Extend the Statutory Period for Collection, the Extension Expires on the Expiration Date Specified in the Waivers.

Conflict in Decisions—THE DECISION OF THE CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT IN THIS PROCEEDING HOLDING THAT THE EXPRESS TERMS OF THE WAIVERS AS TO THEIR EXPIRATION DATES SHOULD BE DISREGARDED IS IN CONFLICT WITH THE DECISION OF THE PENNSYLVANIA CIRCUIT COURT (W. D.), IN THE CASE OF TRIDELL V. MUNHALL, 124 FED. 802; WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THE CASE OF RAHILLY V. O'LOUGHLIN, 1 FED. (2D) 1; WITH THE DECISION OF THE COURT OF CLAIMS IN THE CASE OF ROY & TITCOMB, INC., V. U. S., 39 FED (2D) 753, AND WITH THE DECISION OF THE DISTRICT COURT (DEL.) IN THE CASE OF REMINGTON-RAND, INC., V. U. S., 57 FED. (2D) 1069.

The Circuit Court of Appeals decided that "the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to *revive* the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection."

The Circuit Court of Appeals then decided that regardless of the specific terms of the waiver that the period of extension should expire December 3, 1927, the period of limitations was extended by the waivers to six years after

assessment, or February 9, 1929. [R. 82.] If this is correct, the collection on August 27, 1928, is valid. If the extension of the limitations period did not exceed the time limit prescribed in the waivers (December 31, 1927), the August 27, 1928, collection is invalid.

We have hereinbefore shown that under authority of the case of *Russell v. United States*, Section 278(e) of the Revenue Act of 1924 prevents the application of Section 278(d) of said Act to assessments made prior to June 2, 1924, the date of the enactment of the 1924 Act; that, therefore, the Government did not have six years after assessment within which to collect an assessment made prior to June 2, 1924. We have also endeavored to show that the provisions of Section 278(e) of the Revenue Act of 1926, in general, likewise restricted the application of Section 278(d) of said Revenue Act. In pointing out the difference between Section 278(d) and Section 278(e) of the Revenue Acts of 1924 and 1926, respectively, we noted that there was added to Section 278(e) of the Revenue Act of 1926 a provision that that section (278(e)) would not restrict the application of Section 278 to an assessment made prior to the date of enactment of the Revenue Act of 1926 (February 26, 1926) where the taxpayer and the Commissioner agreed in writing to a later collection or assessment of tax, and we also pointed out that there was added to Section 278(d) a provision that a tax might be collected prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

In view of the simultaneous additions of these provisions to Section 278(d) and Section 278(e), we feel that

it was intended that the sections be treated as related and be so applied as to be operative to bring about a fulfillment of a specific agreement between the Commissioner and the taxpayer. We feel that Section 278(e) of the Revenue Act of 1926 prohibits the application of the six-year period after assessment for collection provided for in Section 278(d); that where the taxpayer and the Commissioner argeed upon a certain period for collection of an otherwise barred tax, which circumstance qualifies the provisions of Section 278(e), then subdivision (d)(2) applies to permit the Commissioner to collect the tax within the period agreed upon. Of course, Section 278(d)(2) might also be given general application to permit the Commissioner and the taxpayer to agree upon the collection of the tax after six years after assessment. There is nothing inconsistent in this double purpose.

Even disregarding the legislative intent as to the application of these sections of the Revenue Act, we respectfully submit that the decision of the Circuit Court of Appeals in this proceeding is contrary to general law. The Circuit Court admits that by reason of the waiver the right to collect, which had theretofore been barred by the Statute of Limitations, was revived.

It is a principle of general law that where a debt is revived by a conditional new promise, it is revived subject to the conditions specified. *Rahilly v. O'Loughlin*, 1 Fed. (2d) 1. It is also a principle of general law that the debtor, in waiving the statute, is entitled to make his own terms and that by these terms alone is he to be bound. *Tridell v. Munhall*, 124 Fed. 802.

If the Commissioner of Internal Revenue was not satisfied with the conditions specified in the waiver, he had the

right to refuse to accept the waiver or to consent to those conditions. In this connection we wish to again call the Court's attention to the fact that the waiver of December 7, 1925 was not signed by the Commissioner of Internal Revenue. The Commissioner signed the waiver of November 29, 1926, and thereby agreed to that waiver and to all of its terms, which agreement he was authorized to enter into under the provisions of Section 278(d) (e) of the Revenue Act of 1926. Certainly nothing could be more definitely expressed than the provisions in the waivers that they shall be effective until a certain date and shall then expire.

When this petitioner, the Pacific Coast Steel Company, agreed with the Commissioner to revive in the Government the right to collect a tax which was barred by the Statute of Limitations, petitioner had the right to specify the terms of such agreement, and when the petitioner specified that the waiver should expire on a definite date, to which specification the Commissioner of Internal Revenue agreed by placing his signature upon the waiver, we respectfully submit that no existing statute could alter the terms of that agreement, or change the expiration date agreed upon, particularly since the agreement was not in violation of public policy. If the waiver had not mentioned an expiration date then the existing statute would have become a part of the waiver and would have supplied that deficiency. The waiver then could have been construed to have extended the time to six years after the

date of assessment. But in this case the parties being charged with a knowledge of the law specifically agreed that the expiration date should be a certain date, that is, December 31, 1927, and thereby limited the existing law in its application to that particular agreement.

In the case of *Roy & Titcomb v. United States* (Court of Claims), 39 Fed. (2d) 753, the Court in referring to the effect of a waiver on the collectibility of an assessment, made on March 13, 1924, stated:

> "Under the provisions of the consent of November 20, 1925 the Commissioner had until March 1, 1927, which was sixty days after December 31, 1926," (the waiver by its terms was effective until December 31, 1926 and sixty days thereafter if no appeal was filed to the Board of Tax Appeals) "within which to collect the amount of the additional assessment for 1918 finally determined to be due."

The additional assessment was made on March 13, 1924, and if the six-year period for collection under the 1926 Act applied, the Commissioner would have had until March, 1930, for collection. The Court must necessarily have concluded that the period for collection was limited to the period prescribed in the waiver. (See, also, *Remington-Rand, Inc. v. United States* (D. C. Delaware), 57 Fed. (2d) 1069, where the Court held that waiver extending time for collection of a March, 1924, assessment to December 31, 1925, did not expire on midnight of December 30th, but included the 31st day. Had the Court applied the six-year provision, the collection period would not have expired until March, 1930.)

CONCLUSION.

It is respectfully submitted that this case involves questions of general public interest; it raises practically every question concerning the validity and effect of waivers which are now in such a state of uncertainty due to conflicting court decisions herein referred to, and to the ambiguous expression of legislative intent as indicated chiefly by the enactment of Section 506 of the Revenue Act of 1928; and particularly is it important to the taxpayers in general to know whether their waivers or agreements with the Commissioner of Internal Revenue, which each year they are being requested to enter into, are to be construed according to their specific terms; the matters involved are important questions of federal and general law which should be settled by this Honorable Court. For these reasons, herein presented to this Court, we respectfully request the issuance of the writ of certiorari in this case.

Respectfully,

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Appendix A.

December 16, 1922.

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, PACIFIC COAST STEEL COMPANY, of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Corporation, for the years 1911 to 1917, inclusive, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

PACIFIC COAST STEEL COMPANY,

[Seal] Taxpayer.

By E. M. WILSON, (Sgd.)
President.

.....

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Appendix B.

(74M)
TREASURY DEPARTMENT
Internal Revenue Service
Form 872A

INCOME AND PROFITS TAX WAIVER FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922.

IT:E:SM
OBB-22907
A-22908
B-22909

Dec. 7, 1925.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL CO., a taxpayer of Rialto Bldg., San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919 and 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

PACIFIC COAST STEEL COMPANY,
Taxpayer,

[Seal]

By E. M. WILSON, (Sgd.)
President.

.....
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Appendix C.

INCOME AND PROFITS TAX WAIVER FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922.

CC:I:II:Cl

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer,

[Seal]

By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Appendix D.

STATUTES INVOLVED.

REVENUE ACT OF 1918 (FEBRUARY 24, 1919), Chap. 18, 40 Stat. at L.

Section 250 (d). Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * *.

REVENUE ACT OF 1921 (NOVEMBER 23, 1921), Chap. 136, title II—Income Tax, 42 Stat. at L.

Section 250 (d). The amount of income, excess-profits, or war-profits taxes due under any return made under this act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this act for prior taxable years, or under prior income, excess profits, or war profits tax acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination of assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this act or under prior income, excess profits, or war profits tax acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, but

this shall not affect suits or proceedings begun at the time of the passage of this act * * *.

REVENUE ACT OF 1924 (JUNE 2, 1924), Chap. 234, title II (effective January 1, 1924), 43 Stat. at L. U. S. C. title 26:

Sec. 277 (a). Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279, (274 and 279 are not here important).

(1) The amount of income, excess-profits and war-profits taxes imposed by the Revenue Act of 1921, and by such act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

Section 278 (c), (d) and (e) hereinafter set out in comparison with same sections of Revenue Act of 1926.

Section 280. If after the enactment of this act the commissioner determines that any assessment should be made in respect of any income, war profits, or excess profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such act as amended, the amount which should be assessed (whether as deficiency

or as interest, penalty, or other addition to the tax) shall be computed as if this act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Section 1100 (a). The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this act) upon the enactment of this act, subject to the limitations provided in subdivisions (b) and (c).

Title II (called "Income Tax") as of January 1, 1924;

* * *

(b) The parts of the Revenue Act of 1921 which are repealed by this act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this act) remain in force for the assessment and collection of all taxes imposed by such act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes * * *.

REVENUE ACT OF 1926 (FEBRUARY 26, 1926), Chap. 27, 44 Stat. at L.

Section 277 (a). Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits and war-profits taxes imposed by the act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Section 278 (c), (d) and (e) hereinafter set out in comparison with same sections of Revenue Act of 1924.

Section 283 (a). If after the enactment of this Act the Commissioner determines that any assessment should

be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax), shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

Section 1106 (a). The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; * * *

Section 1200 (a). The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivision (b);

Title II (called "Income Tax") as of January 1, 1925, except section 257 and sections 271 to 282, inclusive:

Section 257 and sections 271 to 282, inclusive (being certain administrative provisions of the income tax); * * *

(b) The parts of the Revenue Act of 1924 which are repealed by this Act shall (except as provided in sections 283 and 318 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1924, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the Revenue Act of 1924 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

Act of 1926	Act of 1924
Sec. 278 (c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.	Sec. 278 (c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by	(d) Where the assessment of the tax is made within the period prescribed in section 277 of this sec-

prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

tion, such tax may be collected by distraint or by a proceeding in court, begun within six years after assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

REVENUE ACT OF 1928 (MAY 29, 1928), Chap. 852, 45 Stat. at L.

Section 506. Waivers after Expiration of Period of Limitation.

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

"(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

"(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective, according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

Section 607. Effect of Expiration of Period of Limitation Against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 612. Repeal of Section 1106 (a) of 1926 Act.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

Due service of the within Petition and Brief is hereby acknowledged this.....day of November, A. D. 1932.

_____

_____

Attorneys for Respondent.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1932

No. 518.

Pacific Coast Steel Company, a corporation,

Petitioner,

vs.

John P. McLaughlin, United States Collector for the First Collection District of California,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

RALPH W. SMITH,

Counsel for Petitioner,

808 Bank of America Bldg.,

Los Angeles, California.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1932

No. 518.

Pacific Coast Steel Company, a corporation,	*Petitioner,*
vs.	
John P. McLaughlin, United States Collector for the First Collection District of California,	*Respondent.*

BRIEF AND ARGUMENT ON BEHALF OF THE PETITIONER.

OPINION BELOW.

No written opinion was rendered by the United States District Court for the Northern District of California, Southern Division in which court this suit was initiated. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit [R. 65], affirming the judgment of the District Court [R. 86], is reported in 61 Fed. (2d) 73.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered August 22, 1932. [R. 87.] The petition for a writ of *certiorari* was duly filed, and *certiorari* was granted on January 9, 1933, limited to the question of the effect of Section 278(e) of the Revenue Act of 1924. Jurisdiction is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION INVOLVED.

In the petition for writ of *certiorari* several errors were assigned and questions presented. This Court granted the petition limited to the question of the effect of Section 278(e) of the Revenue Act of 1924. The question thus presented in this proceeding might be stated as follows:

Does Section 278(e) of the Revenue Act of 1924 restrict all applicable statutes or rules of law from authorizing the collection of a tax assessed before June 2, 1924, where such collection was barred by operation of the Statute of Limitation before June 2, 1924; and, does that section restrict all legal authorization to extend by waiver given after June 2, 1924, the period of limitation for collection of a tax from application to any case where the tax was assessed before June 2, 1924, and where such collection was barred by the Statute of Limitations before June 2, 1924.

STATEMENT.

A complete statement of the case combining petitioner's contentions regarding the several issues involved is given on pages 4 to 8 of the Petition for Writ of *Certiorari* filed in this proceeding. In view of the limitation of the issue to be considered by this Court there is repeated here a brief statement of the facts containing merely an added statement of petitioner's contention as to how the question involved and now before this Court affects this proceeding.

On March 30, 1918, the petitioner duly filed its 1917 income and profits tax return, and duly paid the tax shown thereon. [R. 4, 28, 65.]

On December 16, 1922, the petitioner filed a waiver (set out in full in Appendix A to Petition for Writ of *Certiorari* filed in this proceeding), consenting to a "determination, assessment, and collection" of its 1917 taxes "irrespective of any period of limitations." [R. 6, 11, 28, 66.] This waiver expired April 1, 1924. [R. 69.]

On February 9, 1923, an additional tax for 1917 was duly assessed against the petitioner in the amount of $257,443.30. [R. 6, 28, 66.]

On April 1, 1924 (the date of expiration of the December 6, 1922, waiver filed by petitioner), the period for collection of the aforesaid deficiency in taxes expired by virtue of the provisions of Section 250(d) of the Revenue Act of 1921. [R. 69, 70.]

On June 2, 1924, the Revenue Act of 1924 was enacted.

On December 7, 1925, the petitioner filed a waiver (set out in full in Appendix B to Petition for Writ of *Certiorari* filed in this proceeding), of the "time prescribed by law for making any assessment", of 1917 taxes [R. 6, 13, 28, 66] and the waiver further provided that "this waiver for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire," unless an appeal is filed to the Board of Tax Appeals. This waiver was not signed by the Commissioner of Internal Revenue nor by any one for him. [R. 13.] The petitioner contended that this waiver was "invalid and ineffective" for the following reasons:

(1) It was an *assessment* waiver which was the only kind of waiver authorized by Section 278(c) of the Revenue Act of 1924, there being no need of collection waivers because of Section 278 (d) which allowed six years after assessment for collection. This waiver could, therefore, not be construed as a waiver authorizing the *collection* of a barred tax.

(2) Section 278 (e) restricts the other subdivisions of Section 278. Therefore, Section 278 (e) would prevent any waiver filed under Section 278(c) from being effective in its application to any assessment or collection of tax which was barred at the time of the enactment of the Revenue Act of 1924.

Regarding petitioner's contention in this regard, the Circuit Court concluded:

"We find no language in subdivision (e) of Section 278 or in any other part of the Act of 1924 that expressly forbids taxpayers from pursuant to the

comprehensive wording of subdivision (c) voluntarily waiving the bar against the collection of validly assessed and unpaid taxes, the collection of which was barred on June 2, 1924." [R. 72.]

"We are of the opinion that the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to revive the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection. We think this conclusion is in consonance with the decision of the Supreme Court. See Burnet v. Railway Equipment Co., 282 U. S. 298; Stange v. U. S., 282 U. S. 274; Brown and Sons v. Burnet, 282 U. S. 283; Aiken v. U. S., 282 U. S. 277." [R. 78.]

On February 26, 1926, the Revenue Act of 1926 was enacted.

On November 29, 1926, the petitioner filed a waiver (set out in full in Appendix C to Petition for Writ of *Certiorari* filed in this proceeding) of the "time prescribed by law for making any assessment" of 1917 taxes. [R. 6, 29, 67.] The waiver further provided that "this waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire."

On June 30, 1927, a part payment of $111,953.71 was made against said 1917 deficiency [R. 7, 28, 67] (which deficiency had theretofore by valid credits been reduced to $215,064.84), by the application by

the Commissioner as a credit against said deficiency, of an amount of $111,953.71 representing overpayments by this petitioner of its income and profits taxes for the years 1918 and 1919.

December 31, 1927, was the expiration date of the waiver period specified in the November 29, 1926, waiver.

On August 27, 1928, the balance of the 1917 deficiency of $103,111.16 plus interest of $26,808.90 was collected by the respondent. [R. 8, 28, 67.]

STATUTES INVOLVED.

In the Petition for Writ of *Certiorari* and Brief in Support Thereof filed in this proceeding, there is contained as Appendix D a statement of the statutes involved. In the interest of brevity they are not repeated here.

SPECIFICATIONS OF ERROR.

In connection with the sole question to which this proceeding before this Court is now limited, the error complained of is:

The Circuit Court of Appeals erred in holding that Section 278(e) of the Revenue Act of 1924 did not qualify Section 278(c) of said Act in respect to waivers on collection of taxes barred prior to June 2, 1924, and that Section 278(e) did not restrict the authority conferred by Section 278(c) to waive the bar of the Statute of Limitation against collection, from applying to any case where the tax was assessed before June

2, 1924, and where the collection was barred prior to June 2, 1924, and in holding therefore that the waiver of December 7, 1925, "was effective and that it operated to revive the right of the government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date of the Revenue Act of 1924 became effective, the Statute of Limitations had run against the remedy of collection." [R. 78.]

PROPOSITIONS OF LAW.

I.

The effect of Section 278(e) is to restrict Section 278 from any retroactive effect and to deprive Section 278 of any possible application to cases where assessment was made prior to June 2, 1924, and where collection was barred by the Statute of Limitations prior to June 2, 1924.

Sections 277, 278, Revenue Act of 1924;

Russell v. U. S., 278 U. S. 181;

U. S. v. Whyel, 28 Fed. (2d) 30;

Uncasville Mfg. Co. v. Commissioner, 55 Fed. (2d) 893.

II.

Retroactive effect should not be given to a statute unless it clearly appears that the law-making body so intended.

U. S. v. Magnolia Petroleum Co., 276 U. S. 160;

Russell v. U. S., supra.

III.

In construing a statute the legislative proceedings culminating in its enactment should be considered for the purpose of ascertaining the meaning of doubtful or ambiguous language, and for determining the legislative intent where the meaning of the statute is obscure.

Blake v. The National City Bank, 90 U. S. 307;

Binns v. U. S., 194 U. S. 486, 495;

U. S. v. Whyel, supra;

Marx v. Hawthorne, 148 U. S. 172.

IV.

Where the enacting clause is general in its language and object, and a proviso or exception is afterwards introduced, that proviso or exception is construed strictly, and takes no case out of the enacting clause which does not fairly fall within its terms.

U. S. v. Dickson, 15 Pet. 141;

Fed. Reserve Bank v. Webster, 287 F. 579.

V.

Where the purpose of the legislature to abrogate or modify the common law rule is clear, the statute must be executed according to its terms and must be strictly construed.

U. S. v. Matthews, 173 U. S. 381;

McCool v. Smith, 1 Black 459;

Thompson v. Thompson, 218 U. S. 611;

Corn Products Refining Co. v. Com., 22 B. T. A. 605.

VI.

If it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute.

Alexander v. Alexandria, 5 Cranch. 7;

Joy Floral Co. v. Commissioner, 29 Fed. (2d) 865.

However, changes introduced into a subsequent statute in *pari materia* cannot authorize a construction of the former statute not consonant or consistent with the language employed in the earlier one.

Russell v. U. S., supra.

VII.

If possible, effect should be given to every clause and part of the statute, and the words used should be given their known and ordinary signification.

D. Ginsberg & Son v. Popkin, 285 U. S. 204;

Old Colony R. Co. v. Commissioner, 284 U. S. 552.

VIII.

Taxing acts, including provisions of limitation embodied therein, are to be construed liberally in favor of the taxpayer.

Bowers v. New York & A. Lighterage Co., 273 U. S. 346, 349;

U. S. v. Updike, 281 U. S. 490.

SUMMARY OF ARGUMENT.

Section 278 has no application to 1917 tax assessments made before the enactment of the Revenue Act of 1924 (June 2, 1924) and it could not therefore authorize an extension by waiver of the period for collection of such tax where before the enactment of the Act the period for collection had already expired.

1. Section 278 operates prospectively only.

2. Subdivision (e) of Section 278 expressly excludes from the influence of Section 278 assessments made before the enactment of the Revenue Act of 1924.

3. It was the intent of Congress in enacting the 1924 Act to distinguish between assessments of taxes under prior acts made before the enactment of the 1924 Act and those made thereafter, and this intent is apparent not only from the construction of Section 278 but also from the legislative history of the enactment of that section.

4. Section 278(e) restricts Section 278(c) from application to assessments made prior to June 2, 1924.

5. Section 278 expresses the *only exceptions* from the application of the general limitation provi-

sions contained in Section 277. Since by its own terms it specifically provides that it should not include as one of the exceptions anything which might affect assessments made before June 2, 1924 or revive any rights barred by the statute of limitations prior to June 2, 1924, Section 277(a)(2) would prohibit the collection of any assessment of 1917 taxes after five years after the 1917 return was filed.

6. The provisions of the limitation statutes of the 1926 and 1928 Act should be construed as declaratory of the intended meaning of Section 278 of the Revenue Act of 1924; therefore, under Section 278 of the Revenue Act of 1924 as construed by the later Acts, any waiver given after the limitation period had expired and after the date of enactment of the Revenue Act of 1924 is ineffective.

7. Section 278(c) provided only for waivers to extend the period for assessment. There was no provision authorizing waivers of the period for collection and it was consistent with the intent of Congress that there be this omission since there could then be no authorization of reviver by waiver of the right to collect a tax where such right of collection had been barred prior to June 2, 1924.

ARGUMENT.

Previous Expression by This Court Upon the Question Herein Involved.

Although the question herein involved was not material in the final decision of this Court in the case of *Burnet v. Chicago Railway Equipment Company*, 282 U. S. 295, 51 Sup. Ct. 137, this Court referred to the question and commented upon it although specifically reserving any definite decision. The facts in that case and the manner in which this question was raised is as follows:

The taxpayer filed its 1918 return on *June 16, 1919*, and an additional tax was proposed on *March 14, 1925*. The taxpayer filed an appeal to the Board of Tax Appeals from this determination on May 6, 1925, and on December 10, 1925, executed a waiver, which was signed by the Commissioner, extending the time for making assessment until December 31, 1926, or until after decision of the Board of Tax Appeals. The Court held that the waiver was not inoperative because executed after the expiration of the five-year period fixed by Section 277(a) of the Revenue Act of 1924, in view of the provisions of Section 278(c) that where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon, and Section 278(c)

was held to apply because the statute of limitations for assessment of the 1918 tax did not expire until *June 16, 1924,* which was *after* the enactment of the 1924 Act. The taxpayer, in an endeavor to sustain his argument that under the 1924 Act a waiver accepted after the statute of limitations had expired was invalid, used the argument that to hold otherwise would cause a discrimination between cases where the period for assessment expired *prior* and where it expired *subsequent* to June 2, 1924, the taxpayer assuming that under the provisions of Section 278(e) no waiver could be accepted after the statute of limitations had expired, where such expiration occurred prior to June 2, 1924. In regard to this, this Court stated:

> "The further argument is made that in view of other sections in the 1924 Act,[2] an interpretation of Sec. 278(c) which permitted the giving of a waiver after the expiration of the five years, would lead to absurdities and inequalities which Congress could not have intended. Reference is made, first, to Sec. 278(e)[3] which, it is urged, renders inoperative any waiver signed after the enactment of the statute where the tax in question was already barred prior thereto.[4] The inequality charged is that the limitation period for the assessment of 1918 taxes due under a return filed before June 2, 1919, could not, under the suggested interpretation, be waived after June 2, 1924, but that the corresponding limitation for the same tax due under a return filed after June 2, 1919, could be so waived. We need not determine

whether respondent is correct in assuming that Sec. 278(e) qualified Sec. 278(c) in respect to waivers on assessment of taxes barred prior to June 2, 1924,[5] for even if that section has this effect, no objectionable inequality would result in permitting a revival of liability in one case and not in the other. *Some arbitrary date must be taken for the imposition of a period of limitation.* It may be taken likewise in regard to its removal." (Italics ours.)

---

[2] Respondent also cites sec. 278(e) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59, which reenacted sec. 278(e) of the 1924 Act, and urges that particular discriminations would result from the combined effect, under certain suggested interpretations, of these two sections. But the effect of a later statute cannot authorize an unintended and undesirable construction of an earlier act. Compare Russell v. United States, 178 U. S. 181, 188, 49 S. Ct. 121 (7 Am. Fed. Tax Rep. 8839).

[3] "(e) This section shall not (1) authorize the assessment of a tax * * * if at the time of the enactment of this Act such assessment * * * was barred by the period of limitation then in existence. * * *." 43 Stat. 300.

[4] In the case at bar, the assessment would not have been barred until June 16, 1924, five years from the date of the return, and after the enactment of the 1924 Act, so that sec. 278(e) is wholly inapplicable. Respondent offers the case of a tax under an earlier return merely for the purposes of its argument.

[5] Subdivision (e) cannot be said to qualify every other subdivision in sec. 278. Nothing indicates an intention to have it limit the effect of sec. 278(a) which permits **assessment** to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. Compare United States v. Updike, 281 U. S. 489, 495, 50 S. Ct. 367, 74 L. Ed. 984 (8 Am. Fed. Tax Rep. 10916); United States v. Lazenby, 5 Fed. (2d) 827 (5 Am. Fed. Tax Rep. 5458). Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers. But see Jacobs Brothers Co. v. Commissioner, 19 B. T. A. 315, which involved sec. 278(c) and related sections of the 1926 Act. Supra, note 2. Compare Gillespie v. Commissioner, 20 B. T. A. 1068, 1079; Steiner Mfg. Co. v. Commissioner, 18 B. T. A. 740; James & Holmstrom Piano Co. v. Commissioner, 19 B. T. A. 322; Wetherell Bros. Co. v. White, D. Mass. (par. 306), decided December 3, 1930, U. S. Daily, December 30, 1930, p. 3291. The decision in Russell v. United States, 278 U. S. 181, 49 S. Ct. 121 (7 Am. Fed. Tax Rep. 8839), involved the interpretation of subdivision (d) which extended the period for collection without any act on the part of the taxpayer. Subdivision (c) is effective only if the taxpayer voluntarily executed a waiver.

This Court's Interpretation of Section 250(d) of the Revenue Act of 1921 as Expressed in the Cases of Stange v. U. S. and Aiken v. Burnet, Should Not Be Followed as the Proper Interpretation of Sections 277 and 278 of the Revenue Act of 1924. Sections 277 and 278 Comprise a New and Complete Statute of Limitation Whose Terms Must Be Construed to Comprehend the Meaning Intended by the Legislature.

INTERPRETATION OF SECTION 250(d) OF THE REVENUE ACT OF 1921.

The 1921 Act was the first to interpose a limitation upon the right of the government to enforce a tax liability already accrued. Under the Act of 1913 there was a three-year limitation on assessment but there was no limitation upon the time within which the tax liability could be enforced by suit without a prior assessment. The 1921 Act barred collection in any manner after five years unless both the Commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax. (*Stange v. U. S.*, 282 U. S. 270.)

There is no question that prior to 1921 the limitation periods on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived, that is, by the giving of a so-called common-law waiver (*Corn Products Refining Co. v. Commissioner*, 22 B. T. A. 605, 624; *Aiken v. Burnet*, 282 U. S. 278, 280) and the debt could be effectively revived even though the waiver be given after the bar of the statute had fallen. (*Stange v. U. S., supra.*)

There is nothing in the Revenue Act of 1921 to indicate an intention upon the part of the legislature to restrict the right of the taxpayer to give and the Commissioner to accept the so-called common law waivers. It is true that Section 250(d) specifically authorizes the use of waivers but such authorization does not declare any intention that it is to abrogate the right to accept the so-called common-law waiver. Conditions existing at the time the Revenue Act of 1921 was enacted, and the wording of Section 250(d), were such that:

> "Congress must have intended that a waiver should be operative even though before the passage of the act, five years had elapsed from the time the return had been filed. Among the earlier revenue acts referred to in Sec. 250(d) was that of (August 5), 1909, the returns under which were required to be filed more than ten years prior to the passage of the 1921 Act. Section 38, Third, 36 Stat. at L. 114, Chap. 6. And returns under the Revenue Act of 1913 were required to be filed more than six years before the passage of the 1921 Act."
>
> "Unless it is to be rendered practically meaningless as applied to tax returns under these earlier acts, it must be construed to permit the execution of waivers after the period of five years." (*Stange v. U. S., supra.*)

So, under the Revenue Act of 1921, Section 250(d), the waivers were valid even though given after the statutory period for collection had expired and after the enactment of the Revenue Act of 1921.

Under the construction given to Section 250(d) of the Revenue Act of 1921 by this Court, it appears that the

purposes of Section 250(d) might be stated to be to place a definite statutory period of limitation on assessment and collection of taxes for any taxable year under any Revenue Act, and to incorporate as statutory law the common law rule providing for the waiver of the bar of the statute of limitation at any time, with the added requirement, inserted to meet exigencies of administration (*Aiken v. Burnet*), that the Commissioner of Internal Revenue sign the waiver or consent.

In all Revenue Acts following the Revenue Act of 1921, there is specific provision regarding the use, validity and effect of waivers. (Sec. 278(c), Revenue Acts of 1924 and 1926; Sec. 506, Revenue Act of 1928; Sec. 276(b), Revenue Act of 1932.) So, commencing with the Revenue Act of 1921 the common law rule as to the effect and validity of waivers is operative only so far as it is not controlled, modified or abrogated by those provisions of congressional enactment in the various Revenue Acts relating to waivers. (*Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92; *Federal Mining & Smelting Co. v. Wittenberg* (1927), 138 Atl. 347 (Sup. Ct. of Delaware); *Corn Products Refining Co. v. Commissioner*, 22 B. T. A. 605, 625.) And in the ensuing discussion of the effect of Sections 277 and 278 of the Revenue Act of 1924, we will show that, while the common-law rule regarding waivers was incorporated as part of Section 250(d) of the Revenue Act of 1921, that rule was completely abrogated and entirely replaced by Sections 277 and 278 of the Revenue Act of 1924 which were enacted to provide for *all* cases of limitations and for authorizations of waivers for extending limitation periods where Congress intended such periods might be

extended. *Where the purpose of the legislature to abrogate or modify the common law rule is clear, the statute must be executed according to its terms and must be strictly construed.* (*U. S. v. Matthews,* 173 U. S. 381; *McCool v. Smith,* 1 Black 459; *Thompson v. Thompson,* 218 U. S. 611.)

SECTION 250(d) WAS NOT REENACTED IN THE REVENUE ACT OF 1924. SECTIONS 277 AND 278 OF THE 1924 ACT IS NEW LAW, AND ALONE PROVIDE FOR THE PERIOD OF LIMITATIONS TO APPLY TO ALL CASES, AND FOR THE AUTHORIZATION OF THE EXTENSIONS OF SUCH PERIODS BY WAIVERS IN ALL THOSE CASES IN WHICH THE LEGISLATURE INTENDED THE PERIOD MIGHT BE SO EXTENDED.

Legislative History of Sections 277 and 278 of the Revenue Act of 1924.

The Revenue Act of 1921 was in effect until June 2, 1924, the date of enactment of the Revenue Act of 1924. A different condition existed on June 2, 1924, than in November, 1921, when the Revenue Act of 1921 was enacted. The Revenue Act of 1921 was the first Act to really place the Commissioner of Internal Revenue on notice that Congress intended that the time for determining taxes relating to years long past gone should have some definite limitation. Because it was first notice it is reasonable that Congress should have intended that the limitation provisions of the Act should be liberally construed. However, almost three years elapsed after the enactment of the 1921 Act before the 1924 Act was enacted. The burden of taxes for old years, particularly the excess profits tax years of 1917 and 1918, became

more and more oppressive to the taxpayers. And Congress, having allowed the Commissioner three years' opportunity under a liberal limitations statute, was moved to adopt a more strict provision regarding limitation periods and to in effect place a definite seal upon the status of assessments and collections as they then existed. So in enacting the Revenue Act of 1924 Congress intended by Sections 277 and 278 to fix beyond change the status of assessments and collections as they existed on the date of enactment of the Act of 1924. In other words, if the assessment, distraints, or proceedings for collection were barred on that date they remained barred; if begun and alive, they were to continue unaffected. (*U. S. v. Whyel*, 28 Fed. (2d) 30.) Congress intended that the limitations statute as enacted in those sections should be a real statute of repose (*Spear & Co. c. Heiner*, 34 Fed. (2d) 795), particularly as to tax assessments made prior to the enactment of the Act.

This intent of Congress regarding the limitation statute is indicated by the legislative proceedings culminating in the enactment of the Revenue Act of 1924. (*Binns v. U. S.*, 486, 495; *U. S. v. Whyel; Blake v. The National City Bank*, 90 U. S. 307; *Marx v. Hawthorne*, 148 U. S. 172.)

A. W. Gregg, Esq., General Counsel of the Bureau of Internal Revenue and legislative expert, who directed the drafting of this act, in explaining the purpose of section 278 to the Senate Finance Committee, said that it was "to keep this section from having any retroactive effect or to apply to things happening before its passage." He further said that its purpose was "to prevent the giving

of any retroactive effect to the provisions of this act. The taxes under prior acts stand on their own footing, and this applies only after the passage of this act."

The Senate finance committee, in its official publication entitled "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715, and the Reasons Therefor, March 5, 1924," at page 27, said with reference to section 278(e): "This subdivision prevents the extension of this section to assessments or proceedings already begun under the existing law." In another report of the Senate Committee on Finance, Report No. 398, p. 32, on the Internal Revenue Bill of 1924, it is stated regarding the purpose of Section 278(e) of that Bill, that:

> "This subdivision has been rewritten to make it clear that the section does not extend to assessments or distraint proceedings already barred by existing law, or to assessments or distraint proceedings already begun under the existing law."

In the same report it is stated regarding Section 278(d):

> "*In order to protect the taxpayer further*, a limitation of six years after the assessment of the tax has been placed upon proceedings in court and distraint for its collection. At the end of such period, the taxpayer is assured that his tax liability is finally determined." (Italics ours.)

The reports of committees of the House and Senate are regarded as expositive of the legislative intent as to the meaning of a statute. (*Binns v. U. S.*, 194 U. S. 486, 495; *U. S. v. Whyel.*)

The grammatical construction of Sections 277 and 278 and the separation of them into distinct sections, the one

fixing the definite statutory period of limitations in all cases, the other specifying the only exceptions from the force of the former, seems conclusive of the expression in the statute of the legislative intent, as will hereinafter be further established.

DISTINCTIONS BETWEEN SECTION 250(d) OF THE REVENUE ACT OF 1921 AND SECTIONS 277 AND 278 OF THE REVENUE ACT OF 1924.

It is conceded that Section 250(d) of the Revenue Act of 1921 did not prohibit the application of the common law rule authorizing waivers of limitation periods after the period had expired. Section 250(d) of the Revenue Act of 1921, however, was repealed by the Revenue Act of 1924 and Sections 277 and 278 were intended to apply to all cases. (*U. S. Whyel; Russell v. U. S.; Uncasville Mfg. Co. v. Commissioner;* Section 1100(a), Revenue Act of 1924—"The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this act) upon the enactment of this act, subject to the limitations provided in subdivisions (b) and (c). Title II (called 'Income Tax') as of January 1, 1924; * * * (b) The parts of the Revenue Act of 1921 which are repealed by this act shall (except as provided in sections 280 and 316 *and except as otherwise specifically provided in this act*) remain in force for the assessment and collection of all taxes imposed by such act. * * *").

Not only, as hereinbefore mentioned, was there such an important change in conditions as they existed on November 23, 1921 when the Revenue Act of 1921 was enacted and on June 2, 1924 when the Revenue Act of

1924 was enacted, which made it advisable to prescribe by specific statute all desirable law and rules regarding limitation periods and waivers, but there is such radical distinction between the construction of Sections 277 and 278 of the Revenue Act of 1924 and Section 250(d) of the Revenue Act of 1921 as to indicate that the legislature intended and actually did, by enacting Sections 277 and 278 of the Revenue Act of 1924, abrogate all common law rules as to waivers and provide by statute the law to be followed as to the extent and effect of the limitation period. There cannot be an effective and operative common law that is essentially different from a clearly expressed statute law. (*U. S. v. Matthews*, 173 U. S. 381; *Federal Mining & Smelting Co. v. Wittenberg* (Del.—1927, 138 Atl. 347).

In Section 250(d) of the Revenue Act of 1921 we find the statute reciting that the period of limitation for assessment and collection should be five years unless the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax. The recital of the statutory period of limitation, and the authorization for acceptance of waivers, and the application of the statute to "determination, assessment and collection" are all confined in the same subdivision of Section 250 (250(d)) of the Revenue Act of 1921.

On June 2, 1924 Congress, in carrying out its intent to cover all cases by specific statute, to promote real repose in the assessment and collection of taxes, and to definitely fix beyond possibility of change, by taxpayer or government, the status of assessments made prior to June 2, 1924, enacted Sections 277 and 278 as part of the Revenue Act of 1924.

Section 277 prescribes a general period of limitation subject only to such *exceptions* as provided in Section 278 (and certain subdivisions of Sections 274 and 279 not material to this case). Section 277 is all-inclusive as establishing the limitation period permitting only as exceptions to its application those exceptions specified in Section 278. Its terms are as follows:

> Section 277. (a) "*Except* as provided in Section 278 * * *
>
> (2) The amount of income, excess-profits and war-profits taxes imposed by * * * the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, *and no proceeding* in court for the collection of such taxes *shall be begun after the expiration of such period.*" (Italics ours.)

What are the exceptions to the strict application of Section 277? Section 278(a) provides that in cases of false and fraudulent returns or where no return was filed the period for assessment is extended indefinitely. Section 278(b) provides that in cases involving deductions for amortization, the period for assessment is extended indefinitely. Section 278(c) provides for waivers as follows:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Section 278(d) provides for an extension of the period for collection of taxes assessed after June 2, 1924. (*Rus-*

sell v. U. S.) By these provisions every possible situation as to exceptions to the application of the general period of limitations for assessment and collection, as they apply to assessments made after June 2, 1924, has been provided for. *Then, in order to make clear beyond doubt its intent that those subdivisions of Section 278 should prescribe the only exceptions, and to remove any doubt that the absence of exceptions as to assessments made prior to June 2, 1924, was intentional and not mere oversight or with the idea that some other law or rule should apply, Congress enacted Section 278(e) to specifically express its intention that Section 278 should not be construed to "authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the period of limitation then in existence."* (Sec. 278(e), Rev. Act of 1924.)

As explained in the Senate Finance Committee Report on the Revenue Bill of 1924, Section 278(e) was carefully worded and inserted to "make it clear that the section does not extend to assessments or distraint proceedings already barred by the existing law." (*Supra*, p. 22.)

Section 278 being a section of a statute containing exceptions or provisos to another section of the same statute, Section 278 must be strictly construed and it cannot take out of the general statute any case which does not fall within the terms of the exceptions specified. (*U. S. v. Dickson*, 15 Pet. 141; *Fed. Reserve Bank v. Webster*, 287 Fed. 579.)

The careful language employed in Section 278(e), the separation of Section 277 and 278, the one to provide for the general limitation periods, and the other to provide for the exceptions, and the direct declaration by Section 278(e) of the intent not to make any other exceptions than those specified and not to authorize the extension of the exceptions specified to matters barred at the time of the enactment of the Act, or to assessments made before June 2, 1924, and the legislative history of those sections, reflect a complete change from the intent and purpose of Section 250(d) of the Revenue Act of 1921 and preclude any application of this court's interpretation of the latter section as a proper interpretation of Sections 277 and 278 of the Revenue Act of 1924. The construction and effect to be given to Sections 277 and 278 must depend upon the wording and form of the sections themselves, from the legislative history of their enactment indicating the intent of Congress as to their purpose and meaning, and from the wording or declaration of meaning contained in sections *in pari materia* enacted in later Revenue Acts.

Section 278(e) of the Revenue Act of 1924 Restricted All Other Subdivisions of Section 278 From Application to Assessments Made Prior to June 2, 1924 Wherever Such Application Would Affect the Status of the Assessments.

EFFECT OF THE CASE OF RUSSELL V. U. S.

The question of the interpretation of Section 278 of the Revenue Act of 1924 first came before this Court in the case of *Russell v. U. S.*, 278 U. S. 181. In that case a 1918 tax was assessed on March 30, 1924. The

government contended that under Section 278(d) of the Revenue Act of 1924 it had six years from assessment, or until March, 1930, for collection. This Court concluded that Section 278(e) restricted Section 278(d) from application to assessments made prior to June 2, 1924. Although this Court had before it only the question of whether Section 278(e) restricted Section 278(d) from application to assessments made prior to June 2, 1924, the date of enactment of the Revenue Act of 1924, the Court's language in interpreting the meaning of Section 278 was general in nature and if literally construed supports the appellant's position in this proceeding that Section 278(e) restricts Section 278(c), as well as Section 278(d) from application to assessments made prior to June 2, 1924. In the Russell case, this Court, after pointing out that the Revenue Act of 1924 created a radical distinction between assessments prior to June 2, 1924, and later ones,[1] stated:

> "Paragraph (e), (2), of Sec. 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the

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[1] When the Revenue Act of 1924 passed many parties were liable for taxes imposed by former acts—1921, 1918, etc.; against some there were assessments; others had not been assessed. It made provision concerning taxes thereafter to accrue; also, for those already due. It distinguished between existing assessments and those which were to follow. It established a board of tax appeals and gave the right of appeal thereto whenever thereafter the commissioner should propose to assess for deficiency. It thus created a radical distinction between assessments prior to June 2, 1924, and later ones which, generally at least, if objected to, could not be made without assent of the board. To secure proper action by the board might require considerable time, and this was provided for by extending the limitation to six years after assessment. But the taxpayer was afforded protection against any improper action by the Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right.

meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive Sec. 278 of any possible application to cases where assessment had been made prior to June 2, 1924.

The legislative history of the Act of 1924 lends support to the conclusion which we have reached. The changes introduced into the Act of 1926 cannot authorize construction of the earlier one not consonant with the language there employed."

Hereinbefore (page 14), we have set forth a quotation from this Court's decision in the case of *Burnet v. Chicago Rwy. Equipment Co.*, wherein this Court explained that the Russell case involved only the question of whether Section 278(e) restricted Section 278(d) and in specifically reserving decision as to whether Section 278(e) restricted Section 278(c) this Court intimated certain possible objections to such a construction.

Effect of the Case of Uncasville Mfg. Co. v. Commissioner.

The very question so reserved for decision by this Court arose in the case of *Uncasville Mfg. Co. v. Commissioner* (2nd Circuit), 55 Fed. (2d) 893, and the Circuit Court in deciding that Section 278(e) restricted the whole of Section 278 from allowing the assessment or collection of a tax barred by existing limitations on June 2 1924, discussed and explained away the possible objections to such an interpretation intimated by this Court in the *Burnet v. Chicago Rwy. Equipment Co.* case. Although we understand that failure to grant

petition for *certiorari* is not necessarily affirmance by this Court of a decision of another Court, we do feel that it is favorably significant that this Court denied petition for *certiorari* in the *Uncasville* case.

In the instant proceeding the Circuit Court of Appeals for the Ninth Circuit distinguished the *Uncasville Mfg. Co.* case on the ground that in the *Uncasville* case the tax had not yet been assessed while in the instant case the tax had been assessed prior to June 2, 1924. We do not believe this distinction is material. There is but one correct tax which is due upon filing of the return and represents a liability after that date. Although deficiencies might not be determined until a later date and might not be payable until after they are determined, they were due when the return was filed, bear interest from that date (under Revenue Acts after 1921 Act), and represent liabilities as of the date they were due. The assessment marks the time the tax becomes payable when collection is to be made through the regular channels. That it does not fix the date of liability is evident from the provisions of the Statute authorizing the enforcement of collection by suit by proceeding in Court without assessment. (Sec. 278, Revenue Act of 1924.)

Effect of the Case of McDonnell v. U. S.

The Court of Claims in the case of *McDonnell v. U. S.*, 59 Fed (2d) 290, now pending before this Court on writ of *certiorari*, expressed its disapproval of the decision in the *Uncasville* case. The Court of Claims pointed out that under the Revenue Act of 1921 the taxpayer could waive the Statute of Limitations after the enactment of the Revenue Act of 1921 even though the

statutory period for assessment and collection had expired before the enactment of that Act. The Court of Claims then continued:

> "In the Uncasville Mfg. Company case the Court construed section 278(e) of the Revenue Act of 1924 as a *prohibition* upon the giving of a waiver by a taxpayer and the acceptance thereof by the Commissioner. We are unable to find any provision in the 1924 Revenue Act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitation, nor do we find anything in such act prohibiting the Commissioner's acceptance of such waiver. This view seems not to have been presented in the Uncasville Mfg. Company case, *supra;* it was not commented upon by the court in its opinion. The court merely stated that subdivision (e) of section 278 of the Revenue Act of 1924 limits the preceding subdivision (c) of section 278 so that subdivision (c) does not *authorize* the extension of time for assessment by a waiver executed after the enactment of the Revenue Act of 1924 where the time for assessment expired prior to the enactment of that act. In Burnet v. Chicago Railway Equipment Co., *supra,* in footnote 5, page 300 of 282 U. S., 51 S. Ct. 137, 139, 75 L. Ed. 349, to the statement in the opinion that 'We need not determine whether respondent is correct in assuming that section 278(e) qualifies section 278(c) in respect to waivers on assessment of taxes barred prior to June 2, 1924,' it is stated that 'Subdivision (e) cannot be said to qualify every other subdivision in section 278. Nothing indicates an intention to have it limit the effect of section 278(a), 26 U. S. C. A., Sec. 1058, which permits assessment to be made or suit to be brought at any time in the case of a false or fraudu-

> lent return or a faiure to file any return. * * * *Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers.'* (Italics ours.) We conclude, therefore, that the Revenue Act of 1924 does not preclude a taxpayer from waiving the benefit of the statute of limitation, and that a waiver given after the enactment of the Revenue Act of 1924, in a case where the statutory limitation had expired prior thereto, and before February 26, 1926, is valid."

Since the Court did not in its opinion make an analysis of Sections 277 and 278 of the Revenue Act of 1924, to determine exactly how those sections were to be construed to give to them the effect intended by the legislature at the time of their enactment, we must conclude that the Court of Claims predicated its decision principally upon this Court's intimations in the *Burnet v. Chicago Rwy. Equipment Co.* case.

In the succeeding pages of this brief we do not intend to direct specific rebuttal to the decision of the Court of Claims in the *McDonnel* case, but intend to accomplish a general rebuttal of that decision by supporting the *Uncasville Mfg. Co.* case and by showing a purposeful amendment by the Revenue Act of 1924 of the Revenue Act of 1921 regarding the validity and effect of waivers, and the legislative intent that such use of waivers given after June 2, 1924, was not to affect the status of an assessment made and barred from collection prior to June 2, 1924, the date of enactment of the Act, and could not extend the limitation period in such a case.

Section 278(e) Does Not Restrict Section 278(a) From Application to Assessments Made Prior to June 2, 1924 Since the Application of Section 278(a) to Those Classes of Cases Referred to in the Section, Would Not Affect an Assessment Made Prior to June 2, 1924.

Reviewing particularly the possible objections by this Court to an affirmative answer to the question involved in this proceeding, as intimated by this Court in the *Burnet v. Chicago Rwy. Equipment Co.* case as aforesaid and following generally the replies made thereto by the Circuit Court in the *Uncasville* case, we respectfully submit our conclusions as to the disposition of those objections as follows:

Subdivision (a) of Section 278 of the Revenue Act of 1924 extends indefinitely the time for all assessments, and extends the time for collections to the period provided for in subdivision (d), where the return was fraudulent, or where no return was filed. *U. S. v. Updike*, 281 U. S. 490; *U. S. v. Lazenby*, 5 Fed. (2d) 827. Under Section 250(d) of the Revenue Act of 1921 the tax in such cases might be *determined, assessed and collected*, at any time. It is obvious that as to these cases, where assessments are made either under Section 250(d) of the Revenue Act of 1921 or Section 278(a) of the Revenue Act of 1924, Section 278(e) could not be applicable because such assessment and collection were not barred on June 2, 1924.

DEFINITION OF TERM "AFFECT" AS USED IN SECTION 278(e) (2).

We have just stated that where, in this class of cases, an assessment had been made prior to June 2, 1924, the time for collection would be the time provided for in Section 278(d) Revenue Act of 1924. (*U. S. v. Updike*, 281 U. S. 490.) This conclusion is not in violation of Section 278(e) (2) of the Revenue Act of 1924 prohibiting the application of the whole of said Section 278 from *affecting* assessments made prior to June 2, 1924. In defining the word "affect" to give it its intended meaning in this Section, it must be observed that this Section with Section 277 is a Statute of Limitations enacted for the purpose of promoting repose insofar as pending tax assessments are concerned. (*Spear & Co. v. Heiner*, 34 Fed. (2d) 795; *Whyel v. U. S.; Russell v. U. S.*) If Section 278(e) (2) were construed to prevent the application of Section 278(d) or (a), or both (d) and (a) together in that class of cases referred to in Section 278(a), to assessments made prior to June 2, 1924, there would have been no period of limitation for the collection of such a tax. As stated by this Court in the *Updike* case—"In such case, to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the Act to promote respose by fixing a definite period after assessment." Since this limitation statute was enacted strictly for the taxpayer's benefit, it must be concluded that the word "affect" as used in

Section 278(e) (2) of the Revenue Act of 1924 refers only to any proceeding or provision which might by extending existing limitation periods, or otherwise, apply to the taxpayer's detriment or against his interests. Certainly the establishment of a six year period for collection in place of an indefinite unlimited period for collection does not affect the taxpayer detrimentally, but does inure to his benefit.

Section 278(e), therefore, does not apply to or restrict Section 278(a) because, first, the collection of any tax assessed in such cases was not barred on June 2, 1924 (Section 250(d) of the Revenue Act of 1921 permitting the collection of such assessment "at any time"), and, second, the combined effect of Section 278(a) and 278(d) to such assessments in such cases does not "affect" the assessments made within the meaning of that word as used in Section 278(e) (2).

Section 278(e) Does Not Restrict Section 278(b) From Application to Assessments Made Prior to June 2, 1924 Since the Application of Section 278(b) to Those Classes of Cases Referred to in the Section, Would Not Affect an Assessment Made Prior to June 2, 1924.

Subdivision (d) of Section 278 of the Revenue Act of 1924 refers to taxes resulting from a change in deductions taken for amortization of war investments, and contains the same provisions as to limitations upon assessment and collection of such taxes as contained in

Section 278(a). Likewise, in this class of cases there was contained in Section 250(d) of the Revenue Act of 1921, the provision that any taxes might be determined, assessed and collected at any time. There is the same situation here as regards Section 278(a) so we must conclude likewise, that Section 278(e) therefore does not apply to or restrict Section 278(b) because, first, the collection of any tax assessed in such cases was not barred on June 2, 1924 (Section 250(d) of the Revenue Act of 1921 permitting the collection of such assessment "at any time"), and, second, the combined effect of sections 278(b) and 278(d) to such assessments in such cases does not "affect" the assessments made within the meaning of that word as used in Section 278(e) (2).

Section 278(e) Does Restrict Section 278(d) From Application to Assessments Made Prior to June 2, 1924 Because to EXTEND the Limitation Period for Collection of a Tax Assessed Before June 2, 1924 Affects Such Assessment in Violation of Section 278(e) (2).

We have already pointed out that under this Court's decision in the *Russell* case, Section 278(e) of the Revenue Act of 1924 prohibits the application of Section 278(d) to assessments made prior to June 2, 1924, because to extend the limitation period for collection of a tax assessed before June 2, 1924 affects such assessment in violation of Section 278(e) (2).

Section 278(e) Does Restrict Section 278(c) From Application to Assessments Made Prior to June 2, 1924 Because to Authorize the Extension of a Period of Limitation for Collection Already Expired as to Such an Assessment Would Not Only Affect Such an Assessment in Violation of Section 278(e) (2) but Would Also Authorize the Collection of a Barred Tax in Violation of Section 278(e) (1).

In the *Uncasville* case the Circuit Court held that Section 278(e) so restricted Section 278(c) as to prevent it from authorizing the revivor by waiver given after June 2, 1924, of the right to assess, where the limitation period for assessment had expired prior to June 2, 1924. Since under this Court's decision in the *Stange* case the term "assessment" as used in Section 278(c) of the Revenue Act of 1924 is synonymous with "collection," (*Hind v. Commissioner*, 52 Fed. (2d) 1075; *Washington Coal & Coke Co. v. Heiner*, 42 Fed. (2d) 681, aff'd 55 Fed. (2d) 229—note also the waiver given by the Pacific Coast Steel Co. on December 9, 1925 was a waiver of the period of limitation on *assessment*), the decision in the *Uncasville* case would be applicable to this proceeding in that its result would prevent the revivor by waiver given after June 2, 1924, of the right to collect an assessment made and barred from collection before June 2, 1924. This should be the proper conclusion since no plain purpose to change or to authorize the change of the status of the claim against the petitioners as it existed just before June 2, 1924, can be spelled out of the words in Section 278 or otherwise. (*Russell v. U. S.*)

In the *Russell* case this Court concluded that Section 278(e) prohibited the extension by statute—Section 278(d), of the period of limitation for collection of an assessment made before June 2, 1924. In this proceeding, the tax assessed on February 9, 1923, was uncollectible by reason of the bar of the limitations, after April 1, 1924. Since Congress intended that the status of assessments made prior to June 2, 1924, should not be disturbed by the Revenue Act of 1924, it must be conceded under the *Russell* case that the provisions of that Act could not extend the period for collection of that assessment. (See legislative history of Sections 277 and 278, *supra*, p. 20.)

In our discussion of the legislative history of Sections 277 and 278 we concluded *that, as was the intent of Congress, they covered all cases involving periods of limitation and waivers,* and any case which did not come within the *exceptions* of Section 278 must be controlled by the strict mandatory provisions of Section 277. As we have also hereinbefore concluded, one of the exceptions provided for by Section 278 is the class of cases where waivers of the limitation period are filed (Section 278(c)), but that exception is restricted in its application from those cases *excluded from the operation of Section 278* by Section 278(e).

In this proceeding therefore which comes directly within the provision of Sections 278(e) (1) and (2), the giving of waivers could not be authorized by Section 278(c) and the strict provision of Section 277 must control. In this case the collection was barred on June 2, 1924, (Section 278(e) (1)) and the tax in question

was assessed prior to June 2, 1924 (Section 278(e) (2)). Because of this situation this Court must conclude that the statute, (Section 278) could not extend the period for collection (*Russell* case). But the Government contends that since the giving of the December 9, 1925 waiver is a voluntary act it is not the statute but the voluntary act which extends the limitation period. However, since the only authority for the validity of the waiver is Section 278(c), *is it not the force of the statute which authorizes* the extension of the limitations period, and thereby authorizes the collection of the tax after the period specified in Section 277? If the waiver of December 9, 1925 is given validity and effect by Section 278(c) is it not true that that Section, Section 278, is thus authorizing the collection of a tax which was assessed before June 2, 1924 and barred from collection at the time of the enactment of the Revenue Act of 1924 by the period of limitation then in existence? And is this not in direct violation of, first, Section 278(e) (1) which specifies that *Section 278 shall not authorize* the collection of a tax barred at the time of enactment of the Revenue Act of 1924?, and, second, Section 278(e) (2) which specifies that *Section 278 shall not affect* by extending the limitation period for collection, any assessment made prior to the date of enactment of the Revenue Act of 1924?

Congress was aware of the fact that the giving of a waiver was not always a "voluntary" act. No taxpayer desires to indefinitely defer the final disposition of his tax affairs. Congress, when it provided in the Revenue Act of 1924 for the creation of the United States Board

of Tax Appeals was aware of the practice of the Bureau of Internal Revenue to levy large arbitrary assessments in cases where the Statute of Limitations was about to expire and where its request for waiver was denied. Congress must also have been aware that this practice was vicious and in many cases caused considerable loss to taxpayers, sometimes causing complete destruction of business ventures, and that the giving of a waiver might be the only alternative in order to avoid such irretrievable loss and hardship. Since Congress was aware of this situation it seems only logical that it would have provided in a statute enacted for the benefit of the taxpayer and for the purpose of promoting repose (*Spear & Co. v. Heiner*) that in any cases where the Statute of Limitations had already expired there was to be no revivor of the rights so barred. (In this connection note the tenor of discussion between A. W. Gregg then Solicitor of Internal Revenue and members of the Ways and Means Committee, House of Representatives, Report of Hearings, Revenue Revision 1925, pp. 1007, 1008; note also limitation provisions in subsequent Acts hereinafter to be referred to.)

ANALYSIS OF TERMINOGY EMPLOYED IN SECTION 278(e).

The conclusion that Section 278(e) restricts Section 278(c) and restricts any authorization of extension of the limitation period in cases involving assessments made prior to June 2, 1924 or a right of collection barred on that date is consistent with the terminology employed in Section 278. This is particularly true if the rule is followed, that if possible, effect should be given to every

clause and part of the statute, and the words used should be given their known and ordinary signification. (*D. Ginsberg & Son v. Popkin,* 285 U. S. 204; *Old Colony R. Co. v. Com.,* 284 U. S. 552). Section 278(e) provides that *"This section"* (which must in the ordinary signification of such a term indicate Section 278, the section of which the paragraph containing the term is a subdivision) "shall not" (the use of the term "shall" expressing command rather than direction) "(1) *authorize* the assessment of a tax or the collection thereof by distraint, or by a proceeding in Court if at the time of the enactment of this Act, such assessment, distraint, or proceeding was barred by the period of limitation then in existence." (There is no ambiguity in this terminology. If Section 277(a) (2) reflects the only law specifying the periods of limitation for collection of a 1917 tax, and if Section 278 reflects the only law relating to *exceptions* from the applicability of Section 277(a) (2) either by reason of waivers or otherwise, and if Section 278 is therefore the only section which might authorize the collection of the tax by distraint or other proceeding in a case where the collection was barred before June 2, 1924, and is barred by the provisions of Section 277(a) (2), then the above provision of Section 278(e) restricts the only section which might authorize the collection in such a case; because of such restriction there is no law or authority under which the collection after June 2, 1924 of that tax barred from collection before that date might be legal or valid, and any proceeding instituted to enforce such collection would be in direct violation of Section 277(a) (2).) And Section 278(e) further provides,—"or, (2) *affect any assessment made,* or distraint

or proceeding in court begun, *before the enactment of this Act.*" (There is no ambiguity in this terminology. We have hereinbefore concluded that the term "affect" means "to extend the period of collection of" or "to authorize the extension of the period of collection of". Therefore, this provision would have the same application to this proceeding, where the assessment of the 1917 tax was made in February 1923 and was barred from collection after April 1, 1924, as Section 278(e) (1).) So, if effect is to be given to the provisions of Section 278(e) (1) and to the ordinary signification of the meaning of those provisions, it must be concluded that because that section restricts from authorizing the extension of the period for collection of the 1917 tax assessed against the Pacific Coast Steel Company in February 1923, the only provision or rule of law which might possibly authorize such an extension, the bar of the statute of limitations imposed by Section 277(a) (2) against the collection of that tax cannot be removed, and any collection of that tax after June 2, 1924 constitutes an overpayment which is refundable.

In view of this discussion the only logical conclusion which can be drawn is the conclusion reached in the *Uncasville Mfg. Company* case, that where the validity of a tax assessment or collection depended upon a waiver given after June 2, 1924, that waiver to be valid must come within the authorization of Section 278(c) which is the only law regulating waivers in effect after June 2, 1924; and that because subdivision (e) of Section 278 confines subdivision (c) to cases where the assessment or collection was not barred on June 2, 1924, a waiver given after June 2, 1924 extending the period for collection of

a tax which was assessed before June 2, 1924 and the collection of which was barred before June 2, 1924, cannot effect a waiver of the right to collect since such a waiver does not come within the authorization of Section 278(c).

In Cases Where Assessment Was Made and Barred From Collection Prior to June 2, 1924, Section 278(e) and (c) May Be Construed as Meaning That the Limitations Period Could Be Extended Only by a Waiver Given Before the Enactment of the Revenue Act of 1924.

EFFECT OF CHANGES IN SECTION 278(c) IN LATER REVENUE ACTS.

In substantiation of the asserted interpretation of Sections 278(e) and 278(c) of the Revenue Act of 1924, we respectfully call attention to the reenactment of those sections in subsequent revenue acts—the Revenue Act of 1926, the Revenue Act of 1928 and the Revenue Act of 1932. In the case of *Russell v. U. S.*, the Court refused to accept the changes introduced in the Revenue Act of 1926 in Section 278(d) thereof as declaratory of the intended meaning of Section 278(d) of the Revenue Act of 1924. The Court found that those changes made in Section 278(d) of the Revenue Act of 1926 were not consonant with the language employed in Section 278(d) of the Revenue Act of 1924. A mere comparison of the two sections will convince that the sections are not in *pari materia*. Where, however, the terms used in a subsequent act on the same subject are consonant with a construction which may be placed upon terms used in the earlier act,

the latter act is to be deemed a clarification of or declaratory of the meaning intended as the meaning of the earlier act.

Following the rule as stated in the case of *Alexander v. Alexandria*, 5 Cranch, 7, 3 L. Ed. 19—"It is to be observed that acts in *pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions are introduced, which show the sense in which the Legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law." So, if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute. (*Joy Floral Company v. Commissioner.*) By invoking this rule in an effort to determine the meaning of Section 278(c) of the Revenue Act of 1924, we disclose this situation. Section 278(c) of the Revenue Act of 1926 is an exact reenactment of Section 278(c) of the Revenue Act of 1924. The same language being employed, the acts can be construed to have intended the same meaning. The Revenue Act of 1926 was followed by the Revenue Act of 1928, section 506 of which reads as follows:

"SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278(c) and (d) of the Revenue Act of 1926 are amended to read as follows:

'(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. * * *'"

It is to be noted, however, that subdivision (c) of Section 506 reserves the above amendment from affecting the validity of waivers made prior to the enactment of the Revenue Act of 1928 and adds that the validity of such waivers shall be determined according to the law in existence at the time such waivers were filed. If, however, Section 278(c), as rephrased under Section 506 of the Revenue Act of 1928, declares the proper interpretation intended by Section 278(c) of the Revenue Acts of 1924 and 1926 as originally enacted, the amendment would not affect the validity of the waivers made prior to the enactment of the Revenue Act of 1928. (*Joy Floral Company v. Commissioner; Panther Rubber Mfg. Co. v. Commissioner,* 45 Fed. (2d) 314; *Wetherell Bros. Co. v. White,* 46 Fed. (2d) 83; *Spear Company v. Heiner,* 34 Fed. (2d) 795; *Pictorial Printing Co. v. Commissioner,* 38 Fed.

(2d) 563; *Columbian Iron Works v. Brock*, 38 Fed. (2d) 816.)

If Section 278(c) as contained in Section 506 of the Revenue Act of 1928 declares the proper interpretation of Section 278(c) as originally enacted in the Revenue Act of 1926, it must necessarily declare the proper interpretation of Section 278(c) of the Revenue Act of 1924, since Section 278(c) as originally enacted in both the Revenue Acts of 1924 and 1926 were identical in language.

We concede that this Court's decision in the *Burnet v. Chicago Ry. Equip. Co.* case holds that an assessment waiver given after the limitation period had expired was valid and effective to extend the limitation period. But in that case the original period of limitations had not expired prior to the enactment of the 1924 Act and Section 278(e) therefore did not apply. We submit that in a case where as in this proceeding, the assessment was made prior to, and the period for collection had expired prior to, the date of enactment of the 1924 Act, Section 278(e) would apply and Section 278(c) could not authorize the extension of the period by a waiver given after the statute of limitations had expired.

The construction of Section 278(c) must give force and effect to the restrictions imposed by Section 278(e) in every case to which Section 278(e) applies. It is entirely consistent that in other cases, free from the restrictions imposed by Section 278(e), Section 278(c) of the Revenue Act of 1924 should, as held in the *Burnet v. Chicago Ry. Equip. Co.* case, authorize extension by waivers even though the waivers be given after the statute has expired.

Effect of Changes in Section 278(e) in Later Revenue Acts.

In this respect we wish also to point out changes in Section 278(e) as enacted in the Revenue Act of 1926. Section 278(e) of the Revenue Act of 1926, though rephrased, is practically the same as Section 278(e) of the Revenue Act of 1924 excepting that it adds a provision which gives it the effect of declaring that nothing in Section 278 shall authorize the collection of a tax barred at the date of the enactment of the act *unless prior to the enactment of the act the Commissioner and the taxpayer* agreed in writing thereto. (*Holmes & Brewsters Federal Tax Appeals*, 1927 ed., page 42—"Subdivision (e) was a rephrasing of Subdivision (e) of the 1924 law * * *.) In this proceeding there was no waiver filed prior to the enactment of the Revenue Act of 1924 which authorized the collection of the 1917 tax after that date, June 2, 1924.

As we have hereinbefore concluded from an exhaustive analysis of the legislative intent of Section 278(e) of the Revenue Act of 1924, the provision contained in Section 278(e) of the Revenue Act of 1926 that any waiver to be effective must have been entered into before the enactment of the act, particularly as it affects assessments made prior to June 2, 1924, is consonant with the construction to be given Section 278(e) of the Revenue Act of 1924 and might, therefore, be stated to be declaratory of the meaning intended by Section 278(e) of the Revenue Act of 1924.

If this construction applies, then the waiver given by the Pacific Coast Steel Company in 1925 could not be

effective to revive the government's right to collect the assessment made in 1923, and it would undoubtedly be true that Section 278(e) thus construed would prohibit Section 278(c) from giving to the waiver any valid effect. The situation would be exactly similar to that existing in the case of *Jacob Bros. Co. v. Commissioner*, 19 B. T. A. 315, where the waiver was given after the enactment of the Revenue Act of 1926 to extend the period of collection of a tax, the collection of which was barred prior to the enactment of the Revenue Act of 1926. The Board in its decision in the case stated:

> "At the time of the enactment of the Revenue Act of 1926 the collection of the tax was already barred by the statutory period of limitation properly applicable thereto and the Commissioner and the taxpayer did not agree in writing prior to the enactment of the Revenue Act of 1926 to any extension of time for the collection of the tax after the expiration of the statutory period. Subdivision (e) of section 278 is a limitation upon all the other provisions of section 278 of the Revenue Act of 1926, and under that subdivision any consent or agreement by the Commissioner and the taxpayer with respect to the assessment or collection of the tax must be made prior to the enactment of that Act in order to have effect, provided at the time of the enactment of the Act the assessment or collection was barred."

(See, also, to same effect: *James & Holmstrom Piano Co.*, 19 B. T. A. 322; *Wetherell Bros. Co. v. White*, 46 Fed. (2) 83; *F. A. Gillespie v. Commissioner*, 20 B. T. A. 1068, 1079.)

In a very recent case decided January 3, 1933 by the United States Circuit Court of Appeals for the First Cir-

cuit, *Commissioner v. Northern Coal Company*, paragraph 9050., C. C. H. Standard Federal Tax Service, 1933, it was held that a waiver given after the period of limitations had expired and subsequent to the passage of the 1926 Act and prior to the 1928 Act is ineffective because Section 1106 of the 1926 Act not only barred the remedy but extinguished the liability. In this case the decision ultimately rested upon the application of Section 1106. However, the Court in analyzing the reason for that section indicated that under prior Revenue Acts, at least the Acts of 1924 and 1926, waivers to be effective must have been executed before the period of limitation expired, and that the provisions to this effect inserted in the later acts indicated "one obvious purpose of Congress, running through the Acts of 1926, Sections 277, 278, and 1928, Sections 275, 506, continued in the Act of 1932, Sections 275, 276, was to speed up the collection of taxes, to abolish the granting of extensions after the expiration of the period of limitation for the assessment of taxes, and definitely to prohibit the practice of collection by distraint after the limitation of the period for collection had expired." The Circuit Court in the case before it was especially interested in the Revenue Acts of 1926 and 1928. Its statement just quoted applies as well to the purpose intended by Sections 277 and 278 of the Revenue Act of 1924 as hereinbefore discussed.

We respectfully submit that in view of the legislative history of the enactment of the various sections regarding the statutory period for limitations commencing with the Revenue Act of 1924, and the obvious endeavors of Congress to import to those limitation provisions a true promotion of repose from tax levies involving matters which

occurred many years ago, and to give to the taxpayer assurance or security from the imposition of almost forgotten burdens against which the statute of limitations had already expired, this Court should conclude that Section 278(e) of the Revenue Act of 1924 so restricts Section 278(c) that the latter section could not authorize waivers which would be effective to revive in the government the right to collect an assessment made prior to June 2, 1924, the period for collection of which had expired prior to June 2, 1924.

Alternative Contention Predicated Upon the Proposition That There Is a Well Recognized Distinction Between Assessment and Collection Which Must Be Recognized in Construing the Meaning of Section 278 of the Revenue Act of 1924.

There is another construction of Sections 278(e) and 278(c) of the Revenue Act of 1924 which we feel might be tenable in support of the proposition that Section 278 prohibits a reviver of the right to collect an assessment made before June 2, 1924 where the right of collection was barred before that date. As we have hereinbefore pointed out, Congress intended that the only law relating to the statutory period of limitation on assessment and collection should be the law as it was contained in Sections 277 and 278 of the Revenue Act of 1924. In Section 250(d) of the Revenue Act of 1921, all provisions regarding the period of limitations referred to the time for "determination, assessment and collection" of the tax. Section 277 (a)(2) of the Revenue Act of 1924 prescribed definitely the period within which taxes under prior revenue acts should be assessed and collected. Sec-

tion 278(c) provides for waivers for "assessment" only. Section 278(d) provides for the "collection" of the tax "where the assessment of the tax is made." In view of the fact that the terms "assessment" and "collection" were used conjunctively in the Revenue Act of 1921, Section 250(d), and were both used in Section 277 of the Revenue Act of 1924, and were used independently in different subdivisions of Section 278, we believe that the use of the word "assessment" alone in Section 278(c) of the Revenue Act of 1924 was intentional and further expressive of the intent of Congress that any tax barred from collection on June 2, 1924 should remain barred. (*U. S. v. Whyel.*) It should also be noted that Section 250(d) of the Revenue Act of 1921 and Section 277(a)(2) of the Revenue Act of 1924 provided the same period of limitation for both assessment and collection, whereas Section 278(d) of the Revenue Act of 1924 provided for a different period of limitation for collection than for assessment.

There Was No Necessity for Collection Waivers After June 2, 1924 in View of the Intention of the Legislature That Assessments Made Before June 2, 1924 Should Not Be Affected by the Revenue Act of 1924, and in View of the Fact That Under the 1924 Revenue Act the Government Is Allowed Six Years After Assessment for Collection of Assessments Made After June 2, 1924.

It is possible that under authority of the case of *Stange v. U. S.*, 282 U. S. 270, Section 278(c) might be construed as authorizing the giving of waivers extending the

time for collection as well as for assessment. In the Stange case, however, the Court, although construing the use of the term "assessment" in a waiver as meaning collection as well as assessment, did state that its decision in that regard did not mean that the distinctions between assessment and collection were to be disregarded but merely that the employment of a single term comprehended both steps. It therefore does not necessarily imply that the use of the word "assessment" in Section 278(c) comprehends both assessment and collection. We have hereinbefore pointed out that it was the intent of the legislature that Section 278(e) should prohibit the application of the whole of Section 278 to assessments made before June 2, 1924. That being true, the only limitation periods applicable to assessments made prior to June 2, 1924 are those specified in Section 277, and if under that section (or Section 250(d) of the Revenue Act of 1921) the collection of an assessment was barred prior to June 2, 1924, nothing in the Revenue Act of 1924, or any other law or rule, could authorize a reviver of the government's right to collect. This, then, confines the provisions of Section 278(c) to assessments made after June 2, 1924, or in other words, Section 278(e) restricts Section 278(c) from authorizing the collection of taxes already assessed, and restricts it further from authorizing waivers for collection. By this restriction, therefore, Section 278(c) can authorize waivers of the period of limitation for assessment only.

Under this construction, the wording of Section 278(c) can be justified. By virtue of the provisions of Section 278(d) there is allowed for collection a period of six years after assessment in all cases where assessment is made after June 2, 1924. (*Russell v. U. S.*) Obviously, therefore, where the statute suffices to authorize the extension by waiver of the period of limitations on assessment, it need not provide for waivers for collection, since as to collection the government has six years after assessment (on assessments made after June 2, 1924—*Russell v. U. S.*) within which to collect. For this reason, Section 278(c) was so worded as to authorize waivers for assessment only. It makes no mention of collection. Such omission was undoubtedly deliberate since, as we have seen, the legislature did not intend Section 278(c) to apply to assessments made prior to June 2, 1924, and as to assessments after June 2, 1924, an extension of the time for the assessment automatically extended the six year period after assessment for collection provided for in Section 278(d).

As stated in the case of *Sunshine Cloak & Suit Co.*, 10 B. T. A. 971, 977:

> "In the 1924 Revenue Act Congress provided in effect that after an assessment had been timely made, the tax could be collected within six years thereafter. It contained no exception with respect to agreements or consents for any period for collection. We cannot add an exception omitted in the statute. Armour Packing Co. v. U. S., 209 U. S. 56; Yturbide v. U. S., 22 How. 290."

Rephrasing of Section 278(d) and (e) in Subsequent Revenue Acts and Re-enactment in Similar Form and Wording of Section 278(c) in Subsequent Revenue Acts Indicate That Section 278(c) of the Revenue Act of 1924 Was Intended to Authorize Waivers of the Period of Limitation on Assessment Only.

We can find further substantiation in support of our contention that it was not intended by the Revenue Act of 1924 that the right of collection which had expired prior to June 2, 1924, might be revived by waivers given after that date, and further that it was not intended that Section 278(c) should authorize any waiver other than an assessment waiver. Section 278(c) of the Revenue Act of 1924 is reenacted without change as Section 278(c) of the Revenue Act of 1926. Section 506 of the Revenue Act of 1926 amended Section 278(c) of the Revenue Act of 1926, but in the amended section the legislature still confined that section to the authorization of waivers for assessment only, the only amendment being to provide that the waivers to be valid must have been given before the expiration of the limitation period. As the reenactment of this section has reflected a consistent purpose of Congress to limit its application to the authorization of waivers for assessment only, we feel that any interpretation of Section 278(c) of the Revenue Act of 1924 should limit it to that purpose. If it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute. (*Joy Floral Co. v. Commissioner; Alexander v. Alexandria*, 5 Cranch. 7, 3 L. Ed. 19). Not only did Congress refuse to change the construction of Section 278(c) in

subsequent acts but it made provision in Sections 278(d) and (e) for extending the period of limitations on *collection* indicating further that Section 278(c) referred to *assessments* only.

In view of the fact that Sections 278(d) and (e) in the Revenue Act of 1926 and as amended by Section 506 of the Revenue Act of 1928 enacted new provisions relating to the extension by waiver of the limitation period for collection, and that there were no similar provisions in the Revenue Act of 1924, we are forced to conclude that the insertion of these new provisions in the 1926 Act was for the purpose of either enacting new law, or supplying an omission in an earlier Act. The phraseology of the sections as enacted in the 1926 Act are so inconsistent with the provisions of the former Act that it is impossible to infer that the later Act was intended as declaratory of the meaning of the former Act. The terms of a later Act cannot be read into an earlier Act where not consonant with the language used in the earlier Act. (*Russell v. U. S.*)

We respectfully submit that the legislative history of the enactment of Sections 277 and 278 of the Revenue Act of 1924 which indicates an intention not to extend limitation periods for collections of assessments made and barred before June 2, 1924, the clear and unambiguous terminology of Section 278(c) to the effect that nothing in the section should authorize the collection of such a tax, the specific use of the word "assessment" in Section 278(c) when considered with the manner in which the terms "assessment" and "collection" were used in other sections, the retention of Section 278(c) in identical terms in later Revenue Acts while providing in other subdivisions of Section 278 for extension by waiver of

the period of limitations on collections, all lead to the inevitable conclusion that there was not intended to be nor was there any authority for extending the period of limitations on collection under the 1924 Act, particularly as to assessments made prior to June 2, 1924, and barred from collection before that date.

Under this contention, therefore, the effect of Section 278(e) of the Revenue Act of 1924 would be to express the intent of Congress, to prevent any misconstruction of Sections 277 and 278, and to specify restrictions which can be stated no better than in the words of Section 278(e) itself that Section 278 (the only provision of law to prescribe or authorize exceptions to the application of the general statute of limitation enacted as Section 277) "shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such asssessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

In either of the alternative positions covered in the foregoing brief, there is sufficient legal substantiation of petitioner's contentions to justify its claim that the government (or the Collector) erred in enforcing collection of the 1917 tax. If to the weight of arguments presented there is added the rule of statutory construction that taxing statutes, including statutes of limitations, should be liberally construed in favor of the taxpayer (*U. S. v. Updike*, 281 U. S. 490; *Bowers v. New York & A. Lighterage Co.*, 273 U. S. 346, 349), the petitioner should prevail.

CONCLUSION.

The petitioner respectfully submits that Sections 277 and 278 of the Revenue Act of 1924 constitute the sole and exclusive provisions of law covering all cases, relating to the periods of limitation for assessment and collection and authorization for extensions of those periods by waiver or otherwise, Section 277(a)(2) specifying the applicable periods of limitation, and Section 278 specifying the exceptions therefrom; that if Section 278(c) authorizes collection waivers, Section 278(c) is limited in its application by Section 278(e)(1) and (2) from authorizing the extension of the period of limitations for collection of the 1917 tax assessed in February, 1923, and barred before the enactment of the 1924 Act, and since Section 278(e)(1) and (2) prevent Section 278(c) from authorizing such extension, this case does not come within any of the *exceptions* from the application of Section 277(a)(2) of the Revenue Act of 1924; that under Section 277(a)(2) the 1917 tax was barred from collection five years after the return was filed, extended by waiver to April 1, 1924, and any proceeding begun after June 2, 1924, for collection of that tax was in violation of Section 277(a)(2) and invalid;

That, in the alternative, Section 278(c) of the Revenue Act of 1924 authorizes the extension of the period of limitations for assessment only; that there was no provision or authority in the Revenue Act of 1924 for collection waivers, since such waivers were not necessary to carry out the purposes of Sections 277 and 278 of that Act; that the failure to provide for collection waivers is consistent with the intent of Congress that the 1924 Act, Sections 277 and 278, should not authorize any extension

of limitation periods which would affect assessments made before June 2, 1924, or authorize collections barred on that date; that since there was, in addition the specific restrictions in Section 278(e)(1) and (2) which gave effect to the legislative intent, there was no law authorizing an extension by waiver after June 2, 1924, of the time for collection of the 1917 assessment which was assessed and barred from collection prior to June 2, 1924.

The petitioner respectfully submits that the respondent erred in enforcing collection of that 1917 tax and that the Circuit Court of Appeals for the Ninth Circuit erred in holding that the waiver of December 9, 1925, revived the right to collect even though such right was barred prior to June 2, 1924, and that Section 278 was ineffective to prevent such reviver; that the decision of the Circuit Court of Appeals is inconsistent with the legislative intent as it is plainly expressed in Sections 277 and 278 of the Revenue Act of 1924; and that, therefore, the judgment should be reversed.

Respectfully,

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Due service of the within brief is hereby acknowledged this.....day of January, A. D. 1933.

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Attorneys for Respondent.

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No. 518

In the Supreme Court of the United States

OCTOBER TERM, 1932

PACIFIC COAST STEEL COMPANY, A CORPORATION, PETITIONER

v.

JOHN P. MCLAUGHLIN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

No written opinion was rendered by the District Court. That court's findings of fact and conclusions of law are contained in the record, pages 37–40. The opinion of the Circuit Court of Appeals (R. 65–86) is reported in 61 F. (2d) 73.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 22, 1932. (R. 86–87.) The petition for certiorari was filed November 21, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether income and excess profits tax waivers, referring only to assessments, were effective to waive the statute of limitations as to the collection of taxes already assessed when the waivers were given.

2. Whether, if the period for collection was extended by waiver to December 31, 1927, the time for collection was limited to the period specified in the waiver, or whether, by virtue of Section 278 (d) of the Revenue Act of 1926, the collection could be made within six years after assessment.

3. Whether a waiver signed by the taxpayer but not signed by the Commissioner of Internal Revenue was valid.[1]

4. Whether a waiver given after the enactment of Section 278 (e) of the Revenue Act of 1924, as to taxes assessed before its enactment, extended the period for collection.

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[1] We contend *infra* that this question should not be considered since it was not raised in the petitioner's claim for refund or in the District Court.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix (*infra*, pp. 11–13).

STATEMENT

Petitioner brought this suit in the District Court for the Northern District of California to recover income and excess-profits taxes collected for the year 1917. The following is a summary of the findings of fact made by the court (R. 37–40):

Petitioner filed its income-tax return for 1917 on March 30, 1918, with the Collector of Internal Revenue for its district, and it paid the tax shown to be due on this return. On June 24, 1920, the Commissioner of Internal Revenue made a tentative determination of a deficiency for 1917 of $209,876.47. On December 9, 1922, the Commissioner determined that the proper deficiency due for this year was $257,443.30. On February 9, 1923, a deficiency in this amount was assessed against petitioner, and on April 1, 1923, a notice and demand for payment was made by the Commissioner. On December 16, 1922, the petitioner consented to a determination, assessment, and collection of the amount of income and excess-profits taxes against it for the years 1911 to 1917, inclusive, under the Revenue Act of 1921 or any prior Revenue Act, irrespective of any period of limitations. On December 7, 1925, the plaintiff agreed to waive the time prescribed by law for making any assessment of taxes for 1917, 1918,

1919, and 1920, this waiver to remain in effect until December 31, 1926. On November 19, 1926, this period was extended until December 31, 1927. No proceeding to collect any deficiency in taxes for 1917 was begun prior to December 7, 1925.

On July 16, 1927, the Commissioner gave petitioner a notice and demand in writing of a deficiency in taxes for 1917 of $129,200.06 remaining after the application of certain overpayments by petitioner of its taxes for 1918 and 1919 as credits upon the deficiency for 1917. On August 27, 1928, petitioner paid the balance of the deficiency claimed.

Petitioner on October 23, 1928, filed a claim for refund of its taxes for 1917 in the amount of $284,252.20, the grounds set forth in the claim for refund being made the basis of the instant suit. This claim was rejected December 14, 1928.

The District Court gave judgment for respondent. (R. 46–47.) The Circuit Court of Appeals affirmed this judgment. (R. 86–87.)

ARGUMENT

The principles applicable to the first two questions have been decided by this Court in favor of the respondent. Accordingly, we submit that there is no necessity for a review of the merits of these two questions.

As to the first question, in *Stange* v. *United States,* 282 U. S. 270; *Aiken* v. *Burnet,* 282 U. S. 277, and *W. P. Brown & Sons Lumber Co.* v. *Bur-*

net, 282 U. S. 283, this Court held that a waiver in terms mentioning only assessment of taxes also applied to collection. Although in those cases the deficiency had not been assessed at the time the waiver was given, while here an assessment had already been made, the same principles seem to apply to both situations. The waivers here were undoubtedly given to permit reconsideration of petitioner's tax liability. It may be noted that subsequently, on June 30, 1927, an abatement of $38,545.02 of the deficiency was allowed. (R. 7, 16.) The parties could not have intended to have the amount of the tax ascertained as a result of the waivers and then allow its collection to depend upon the petitioner's whim. Cf. *Stange* v. *United States, supra,* p. 277. The point was decided in favor of the United States in *Roy & Titcomb* v. *United States,* 39 F. (2d) 753 (C. Cls.), where the assessment had been made prior to the giving of the waiver. In affirming that decision (282 U. S. 811) this Court cited *inter alia* the *Stange, Aiken,* and *W. P. Brown & Sons Lumber Company cases, supra.* See also *Washington Coal & Coke Co.* v. *Heiner,* 55 F. (2d) 229 (C. C. A. 3d). Neither *Bowers* v. *New York & Albany Lighterage Co.,* 273 U. S. 346, nor *Russell* v. *United States,* 278 U. S. 181, cited by the petitioner was concerned with the effect of waivers.

As to the second question, the court below properly held that since the last waiver extended the

period for collection to December 31, 1927, within the effective date of the Revenue Act of 1926, the six-year period allowed for collection after assessment provided by Section 278 (d) of that Act (*infra*, p. 12) applied, and extended the time to February 9, 1929. Accordingly, the court below held that collection of a portion of the assessment by application of a credit on or about July 16, 1927, prior to the expiration of the last waiver and collection of the balance of the assessment on August 27, 1928, within the time limited by section 278 (d) of the 1926 Act was timely. The contention (on which petitioner relies) that collection was barred after December 31, 1927, the date of expiration of the last waiver, was rejected by this Court in *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U. S. 453. It was there held that waivers were not binding contracts, limiting the time in which the Commissioner could assess and collect taxes, and that the six-year period for collection after assessment provided by the Revenue Act of 1926 applied, even though such period was contained in a statute enacted after the waivers were given. Neither *Roy & Titcomb* v. *United States*, *supra*, nor *Remington-Rand, Inc.*, v. *United States*, 57 F. (2d) 1069 (Del.), cited by the petitioner, is to the contrary, since in those cases it was held that collection was made within the period mentioned by the waiver and the courts found it unnecessary to determine whether the six-year period after assessment applied.

We submit that the contention, that the waiver of December 7, 1925, was invalid because not signed by the Commissioner, may not be urged as a ground for recovery because it was not presented in the petitioner's claim for refund nor set forth in its complaint. *Rock Island, Arkansas & Louisiana R. R.* v. *United States,* 254 U. S. 141; *Baltimore & Ohio R. R.* v. *United States,* 260 U. S. 565; *United States* v. *Felt & Tarrant Mfg. Co.,* 283 U. S. 269.

The claim for refund (R. 20–21) did not urge the contention that the waiver of December 7, 1925, was invalid because it had not been signed by the Commissioner. The claim specifically set forth the waivers, conceded that they were effective to extend the period for assessment, and urged as the only objection that they did not revive the Government's right to collect a tax already assessed. (R. 20.) The concession that the waiver was effective to extend the period for assessment is directly opposed to a contention that it was ineffective because not properly executed. The objection was not specifically raised in the complaint nor was the point discussed by the Circuit Court of Appeals. The contention was advanced for the first time in petitioner's brief in the court below and objection to its consideration was made in the Government's brief because the point was not raised in the claim for refund.[2]

[2] It has been held that a waiver is valid although not signed by the Commissioner or by any person on his behalf. *Commissioner* v. *Hind,* 52 F. (2d) 1075 (C. C. A. 9th).

Although the claim for refund did not raise the question whether a waiver, given after the effective date of the Revenue Act of 1924, is effective in view of Section 278 (e) of that Act to extend a period for collection which had expired prior to enactment of the Act,[3] the respondent did not object to its consideration in either court below. For this reason we do not urge that the fourth question should not be considered because the point was not raised in the claim for refund. It is possible that respondent's action in not raising the objection in the trial court or in the court below caused the petitioner to fail to take available steps to protect its rights and to preserve this question for review. Cf. *Tucker* v. *Alexander,* 275 U. S. 228. Whether or not it could have done so, we do not make the objection as to the question in this case.

We believe, however, that the fourth question does not merit review by this Court. The question is narrow in its scope, involving only the validity of waivers given during the effective period of the Revenue Act of 1924 to extend the period of collec-

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Signature by the Commissioner is only necessary for administrative purposes. See *Stange* v. *United States*, *supra*, p. 276. The sole decisions to the contrary cited by the petitioner are those of the Board of Tax Appeals in *Corn Products Refining Co.*, 22 B. T. A. 605, and *United States Refractories Corp.*, 23 B. T. A. 872.

[3] The first waiver, executed on December 16, 1922, expired by departmental ruling on April 1, 1924. The Revenue Act of 1924 became effective June 2, 1924. The second waiver was executed by petitioner on December 7, 1925.

tion which had expired prior to the enactment of that Act. Petitioner urges as a reason for review that the decision of the court below upon this question is in conflict with the decision in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 F. (2d) 893 (C. C. A. 2d), certiorari denied 286 U. S. 545.[4] We believe, however, that there is no conflict between the decisions. The *Uncasville case* involved the effect of Section 278 of the Revenue Act of 1924 upon waivers subsequently given to extend the period of assessment of a tax where no assessment had occurred before the enactment of the Act. Assessment in the instant case was made prior to the enactment of the Revenue Act of 1924. In *Russell* v. *United States,* 278 U. S. 181, this Court held that Section 278 of the Revenue Act of 1924 did not apply to assessments made prior to its effective date. Accordingly, it seems clear that whether or not the Revenue Act of 1924 had any effect upon assessments made after its enactment under waivers subsequently executed, it had no effect upon the waivers involved in the instant case or the collection of the tax here involved. As pointed out above (pp. 5, 6) the waivers executed by petitioner extended the period for collection to December 31, 1927, within the effective date of

[4] The question upon which certiorari was sought has no connection with the question here involved. The same question as to the validity of a waiver decided in the *Uncasville Manufacturing Co. case* is also involved in *McDonnell* v. *United States*, and *Truda* v. *United States*, now pending on certiorari, Nos. 330, 331, October Term, 1932.

the Revenue Act of 1926 and thus collection was timely because expressly authorized by Section 278 (d) of that Act. The decision of the court below pointed out the differences between Section 278 in the 1924 and the 1926 Acts and clearly distinguished the *Uncasville case* reaching, as we contend, the correct conclusion on this question, which is in accord with the principle of prior decisions by this Court. We believe that there is no conflict of decisions and that this question, like the others presented, should not be reviewed by this Court.

CONCLUSION

We submit that the decision of the court below was correct, and that such questions as have been properly presented are governed in principle by previous decisions of this Court. The petition should be denied.

Respectfully submitted.

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DECEMBER, 1932.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C., Title 26, Sec. 1060.)

* * * * *

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court begun before the en-

actment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App., Title 26, Sec. 1062.)

U. S. GOVERNMENT PRINTING OFFICE: 1933

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Office Supreme Court
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No. 518

In the Supreme Court of the United States

OCTOBER TERM, 1932

PACIFIC COAST STEEL COMPANY, A CORPORATION, PETITIONER

v.

JOHN P. MCLAUGHLIN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 518

PACIFIC COAST STEEL COMPANY, A CORPORATION, petitioner

v.

JOHN P. MCLAUGHLIN, UNITED STATES COLLECTOR of Internal Revenue for the First Collection District of California

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

No opinion was rendered by the District Court. The court's findings of fact and conclusion of law are contained in the record, pages 37–40. The opinion of the Circuit Court of Appeals (R. 65–86) is reported in 61 F. (2d) 73.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 22, 1932. (R. 86–87.) A petition for certiorari was filed November 21, 1932, and

granted January 9, 1933, limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924. (R. 89.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a waiver of the statute of limitations, executed after the Revenue Act of 1924 became effective, as to the collection of income taxes for 1917, assessed prior to the effective date of the 1924 Act, is invalid by reason of the provisions of Section 278 (e) of that Act.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix (*infra*, pp. 14–16).

STATEMENT

Petitioner brought this suit in the District Court for the Northern District of California to recover income and excess-profits taxes collected for the year 1917. The following is a summary of the findings of fact made by that court (R. 37–40):

On March 30, 1918, petitioner filed its income-tax return for 1917 with the Collector of Internal Revenue for its district and paid the tax shown to be due on this return. (R. 37.) On December 9, 1922, the Commissioner of Internal Revenue determined a deficiency for 1917 of $257,443.30. (R. 37–38.) On December 16, 1922, the petitioner consented to a determination, assessment, and collection of income

and excess-profits taxes against it for the years 1911 to 1917, inclusive, under the Revenue Act of 1921 or any prior Revenue Act, irrespective of any period of limitations.[1] (R. 38.)

On February 9, 1923, a deficiency in the above amount of $257,443.30 was assessed against the petitioner, and on April 1, 1923, a notice and demand for payment was made by the Commissioner. No proceeding to collect this deficiency was begun prior to December 7, 1925. On that day the petitioner agreed to waive the time prescribed by law for making any assessment of taxes for 1917, 1918, 1919, and 1920, this waiver to remain in effect until December 31, 1926. (R. 38–39.) This period was on November 19, 1926, extended to December 31, 1927. (R. 39.)

On July 16, 1927, the Commissioner demanded payment of the deficiency of $129,200.06 in taxes for 1917 remaining after the application of overpayments by petitioner of its taxes for 1918 and 1919 as credits upon the deficiency for 1917. (R. 39.)

Petitioner paid the balance of the deficiency claimed on August 27, 1928, and filed a claim for refund on October 23, 1928, for its 1917 taxes in the amount of $284,252.20, which was rejected December 14, 1928. (R. 39–40.)

---

[1] Under a later ruling of the Treasury Department this consent was held to expire on April 1, 1924, Mim. 3085, C. B. II–1, p. 174. *Aiken* v. *Burnet*, 282 U. S. 277, 279.

The District Court gave judgment for respondent (R. 46–47), and the Circuit Court of Appeals affirmed this judgment (R. 86–87). This Court granted certiorari, "limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924." (R. 89.)

SUMMARY OF ARGUMENT

Under the decision in *Russell* v. *United States*, 278 U. S. 181, the provisions of paragraph (e) of Section 278 of the Revenue Act of 1924 do not apply to a tax assessed before the Revenue Act of 1924 became effective, and consequently the limitation in that paragraph does not apply to the taxes here involved, which were assessed before the Act became effective. The waiver in 1925 was valid and extended the period of collection within its stated terms. It was authorized by Section 250 (d) of the Revenue Act of 1921 as kept in effect by the 1924 Act.

However, if Section 278 of the 1924 Act makes no distinction between waivers of collection given for taxes assessed before the effective date of that Act and those after that date, we submit that paragraph (c) of that section applies to collection as well as assessment waivers, and made effective the waivers in question. Furthermore, any doubt as to the validity of these waivers under Section 278 of the 1924 Act is removed by Section 278 of the 1926 Act. We adopt the argument set forth in the brief for the United States in *McDonnell* v. *United*

States, No. 330, October Term, 1932, now pending after argument, which deals with the effect of paragraph (e) on paragraph (c) of Section 278 of the 1924 Act, and we also adopt the argument made therein as to the effect of Section 278 of the 1926 Act. As there argued, the waivers executed after 1924 were clearly valid and effective.

ARGUMENT

Petitioner filed its income tax return for 1917 on March 30, 1918. Under Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265,[2]) the time for the assessment and collection of taxes for this year expired March 30, 1923, unless this period was extended by a written agreement of the Commissioner of Internal Revenue and the taxpayer. On February 9, 1923, which was within five years from the time the return was filed, the Commissioner made a valid deficiency assessment for 1917.

Although a demand was made, no proceeding to collect this deficiency was begun within the five-year period as extended by waiver.[3] On December 7, 1925, which was after this period had expired,

[2] This statute provided that the amount of taxes due for the year 1917 "* * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *."

[3] See footnote 1 (*supra*).

the petitioner agreed by written waiver to extend the time for making collection[4] to December 31, 1926. On November 19, 1926, an additional waiver was given, further extending this period to December 31, 1927. (R. 38–39.) Within this latter period a part of the deficiency was paid by the application of a credit. As the waivers extended the period for collection to December 31, 1927, which was within the effective date of the Revenue Act of 1926, the six-year period allowed for collection after an assessment had been made, as provided by Section 278 (d) of that Act (*infra*, p. 15), applied, and this period extended to February 9, 1929. The remainder of the deficiency was collected August 27, 1928. The court below held that the collection of the deficiency assessment by credit and subsequent payment of the balance within the time limited by Section 278 (d) of the 1926 Act, was timely.

No express statutory provision is necessary to make valid a waiver by a taxpayer of the period of limitations on the collection of a tax. *Aiken* v. *Burnet*, 282 U. S. 277; *W. P. Brown & Sons Lumber Co.* v. *Burnet*, 282 U. S. 283. Furthermore, a collection waiver is not invalid merely because it

[4] Although these waivers in terms mentioned only "assessment" they also operated to extend the time for collection. *Stange* v. *United States*, 282 U. S. 270; *Aiken* v. *Burnet*, 282 U. S. 277; *W. P. Brown & Sons Lumber Co.* v. *Burnet*, 282 U. S. 283. In the petition for certiorari it was urged that these waivers did not relate to collection but certiorari was limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924.

was executed after the applicable period of limitations had expired. *Stange* v. *United States*, 282 U. S. 270; *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S. 295. Consequently the waivers executed in this case were valid and effective unless they were rendered invalid by express statutory provisions.

The Revenue Act of 1924 became effective June 2, 1924, and was in force when the waiver of December 7, 1925, was executed. Section 277 of that Act established periods of limitations for the collection of all taxes imposed by that and earlier Acts. The provisions of this section were made subject to the exceptions set forth in Section 278. Paragraph (a) of the latter Section provides that, in the case of a false or fraudulent return, the assessment and collection of a tax might be made at any time; paragraph (b) that any deficiency due to a change in an amortization allowance under the Revenue Acts of 1918 or 1921 might be assessed or collected at any time; paragraph (c) that the Commissioner and the taxpayer may consent to the *assessment* of a tax after the time prescribed in Section 277; and paragraph (d) that where a tax had been assessed within the period prescribed in Section 277 or Section 278 it may be collected within six years after the assessment. Paragraph (e), the final paragraph of this section, provides that—

> (e) This section shall not (1) authorize the assessment of a tax or the collection

> **thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.**

Petitioner contends that this paragraph made the waiver of December 7, 1925, ineffective, because the collection became barred on April 1, 1924, when the waiver of December 16, 1922, expired.[5] This was prior to the enactment of the Revenue Act of 1924. This Court, in granting certiorari, has limited its review to a consideration of the effect of Section 278 (e) of the Revenue Act of 1924.

We submit that paragraph (e) (1) of that section has no application to the collection of a tax validly assessed before the Act became effective,

---

[5] In *McDonnell* v. *United States*, No. 330, October Term, 1932, argued January 17, certiorari was limited, as in this case, to the question of the effect of Section 278 (e) of the 1924 Act. The *McDonnell case* involved the question of the effect of that section on *assessment* waivers given after the effective date of the Act and after the time for assessment had run. This case involves the effect of that section on *collection* waivers given under like circumstances, with the important difference that here the assessment had been timely made, before the 1924 Act had become effective. Much of what was said in the Government's brief in the *McDonnell case* applies here. We believe that if the Government is sustained in the *McDonnell case* it should prevail here. And even if the *assessment* waivers in that case are held invalid, we think, for the reasons hereinafter given, the *collection* waivers in this case are good.

and that subdivision (2) of that paragraph expressly exempts from the operation of the section the tax in question. In *Russell* v. *United States,* 278 U. S. 181, this Court considered whether Section 278 of the 1924 Act applied to an assessment made before that Act became effective so as to extend the period for collection. It held that paragraph (d) applied only to taxes which had not been assessed at the time the Revenue Act of 1924 became effective. It was pointed out that a distinction was made in that Act between existing assessments and those yet to be made, by reason of the fact that the Board of Tax Appeals had been established with the right to appeal thereto whenever thereafter the Commissioner should propose to assess a deficiency. Since the appeal would not lie where the assessment had already been made, there was not the reason for the extended period for collection that existed if the Board was to review the Commissioner's action. It was said (p. 188):

> No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in § 278 or otherwhere.
>
> * * * *The rather obvious design, we think, was to deprive § 278 of any possible application to cases where assessment had been made prior to June 2, 1924.* (Italics ours.)

The above language of this Court expressly covers the instant case, and, unless it is to be qualified,

prevents application of Section 278 (e) of the 1924 Act as a bar to collection of the taxes now involved, which otherwise would be valid.

There is a further reason for concluding that the "collection" referred to in subdivision (1) of paragraph (e) of Section 278 of the 1924 Act does not mean the collection of a tax theretofore assessed. The provision is that the section shall not "authorize the assessment of a tax or the collection *thereof* by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence." (Italics ours.) We submit that the terms "assessment" and "collection *thereof*" must be read together as applying to the same tax, and that "collection *thereof*" refers only to the collection of a tax, the assessment of which was barred at the time the Revenue Act of 1924 became effective, and that the collection of a tax already assessed at that time is not within the operation of this subdivision. The use of "thereof" indicates that this was the purpose of Congress. Unless this construction is adopted, the second part of the subdivision would seem to be without effect for it is there provided that the section shall not "affect any assessment made * * * before the enactment of this Act." To construe this section as barring the collection of a tax already assessed would clearly "affect any assessment made" within the meaning of the statute. The language quoted above from the *Russell case* supports this construc-

tion. Furthermore, it is in accord with the intent of Congress. See House Report 179, 68th Cong., 1st Sess., pp. 26 and 64; Senate Report 398, 68th Cong., 1st Sess., p. 32.

It has been argued above that the waiver of December 7, 1925, was valid without any statutory provision to authorize it, even though it was given after the applicable period of limitations had expired. If this is so, the waiver in question, not being affected by Section 278 of the 1924 Act, was a valid link in the extension of time until the collection in question was made. If, as the language in the *Russell case* and in subdivision (2) of paragraph (e) of Section 278 of the 1924 Act indicates, paragraph (c) of that section does not cover the waiver in question, we submit that it is authorized by Section 250(d) of the Revenue Act of 1921, which gives effect to a written waiver by the Commissioner and taxpayer of a later assessment and collection of a tax than that allowed by the statute of limitations. This section, as applied to the collection in question, was kept in force by Section 1100(b) of the Revenue Act of 1924, which provides that the parts of the Revenue Act of 1921 that are repealed by the 1924 Act shall remain in force for the assessment and collection of taxes imposed by the 1921 Act.

But if Section 250 (d) has been superseded as to the tax in question by the 1924 Act, and Section 278 of that Act is applicable here we submit that,

as was suggested in the footnote in *Burnet* v. *Railway Equipment Co.*, 282 U. S. 295, 300, paragraph (c) of the latter section was not modified by its paragraph (e) and the waiver in question was authorized by paragraph (c). Although that paragraph referred only to assessment waivers, it should be construed to include collection waivers. (*Stange* v. *United States,* 282 U. S. 270.) The argument in the Government's brief in *McDonnell* v. *United States,* No. 330, October Term, 1932, now pending after argument, more fully develops our contention as to the effect of paragraph (c) on assessment waivers. It is, we believe, applicable also to collection waivers. That brief also establishes that all doubt as to the validity of the waivers in this case under Section 278 of the Revenue Act of 1924 is removed by Section 278 of the Revenue Act of 1926. In view of the limitation of the question as to which certiorari was granted we do not burden the Court with a repetition of the contentions made in our brief in No. 330 and adopted, so far as applicable, here.

CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY, 1933.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C., Title 26, Sec. 1060.)

* * * * *

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor

shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App., Title 26, Sec. 1062.)

U. S. GOVERNMENT PRINTING OFFICE: 1938

SUPREME COURT OF THE UNITED STATES.

No. 518.—October Term, 1932.

Pacific Coast Steel Company, Petitioner, *vs.* John P. McLaughlin.	On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 13, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

McDonnell v. *United States*, decided this day, involved the question of the effect of § 278 (e) on assessment waivers where the period for assessment had expired before the effective date of the Act of 1924. This case involves the effect of that section on collection waivers where the period for collection had expired before the effective date of the Act of 1924, but where the assessment had been timely and before the Act.

On May 13, 1929, Pacific Coast Steel Company brought this action in the federal court for northern California, to recover the amount paid as additional income and excess profits taxes for the year 1917. The return for that year was made, and the tax thereby shown to be due was paid, on March 30, 1918. On December 9, 1922, the Commissioner of Internal Revenue determined a deficiency of $257,443.30; and on February 9, 1923, he assessed that amount against the plaintiff. Thus the assessment was made within five years from the date of the filing of the return and before expiration of the period allowed therefor by § 250 (d) of the Revenue Act of 1921. Thereafter, by proceedings in the Bureau, the amount of the claimed deficiency was reduced to $129,920.06 through credits of overpayments of other years. For that amount the Commissioner made demand on July 16, 1927: that is, more than five years after the date of the taxpayer's return, in 1918. The Government relied, as extending the period for collection, upon a waiver given on December 7, 1925; that is, more than five years after the return.

The District Court, without opinion, entered judgment for the defendant. The Circuit Court of Appeals held that the waiver, though in terms extending the time for assessment, was effective to extend that for collection; and that the waiver was valid under § 278 of the Revenue Act of 1924. The judgment of the District Court was accordingly affirmed. 61 F. (2d) 73. This Court granted certiorari, "limited to the question of the effect of section 278 (e) of the Revenue Act of 1924." 287 U. S. —.

The petitioner contends that clause (2) of paragraph (e) of § 278, which states that the section shall not "affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act," renders paragraph (e) inoperative in the case at bar; that the waiver therefore had no statutory authority and was of no effect. The Government insists, in answer to this contention, that even if clause (2) thus qualifies paragraph (e),[1] the waiver is nevertheless valid either without express statutory authority or under the authority of the Revenue Act of 1921, § 250 (d),[2] which, it is argued, remained in force by virtue of § 1100 (d) of the Act of 1924.[3] We do not pass upon this contention of the Government; for we are of opinion that paragraph (e) is not rendered inoperative by clause (2) of paragraph (e).

---

[1] "(e). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon." Act of June 2, 1924, c. 234, § 278 (e), 43 Stat. 253, 299.

[2] "(d) . . . the amount of any such taxes due under any return made under this act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, . . . shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; . . . " Act of November 23, 1921, c. 136, § 250 (d), 42 Stat. 227, 265.

[3] "(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for . . . the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. . . ." Act of June 2, 1924, c. 234, § 1100 (b), 43 Stat. 253, 352.

The meaning of clause (2) was considered in *Russell* v. *United States,* 278 U. S. 181. It was there pointed out that the distinction in the Act of 1924 between existing and subsequent assessments derived significance from the contemporaneous creation of the Board of Tax Appeals. Assessments made after June 2, 1924, "generally at least, if objected to, could not be made without assent of the Board. To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment." 278 U. S. at 186. Where an assessment was made before the Act, the reason for the extension did not exist. In the case of waivers, no such considerations exist to indicate that Congress intended to distinguish between assessments made before and those made after the Act. It was held in the *Russell* case that to apply paragraph (d), extending the period for collection to six years after assessment, to an assessment made before the Act, would "affect" that assessment, and hence was forbidden by clause (2) of paragraph (e). Such an application, it was said, "would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired." 278 U. S. at 187. In the case at bar no such effect follows upon a recognition of the waiver. The claim against the petitioners was barred, it is true, at the time of the enactment of the 1924 Act; but even before the Act the claim was subject to revival by waiver of the statute of limitations. We are of opinion, therefore, that paragraph (e) does not "affect" the assessment in the case at bar so as to be rendered inoperative by clause (2) of paragraph (e).

There remains the question of the effect of clause (1) of paragraph (e), which provides that § 278 shall not authorize an assessment or collection already barred at the effective date of the 1924 Act. This is the same question considered in the *McDonnell* case, *ante,* p. —, with respect to assessment waivers, and for the reasons there stated we hold that the clause does not impair the validity of the waiver here involved.

Affirmed.